Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

COLTEC INDUSTRIES, INC.,

Petitioner,

v.

WILLIAM P. HOBGOOD, MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS O. S. RAND, ELLIOT A. SEGAL, CARLTON R. SICKLES, GAIL R. WILENSKY, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; THE UMWA COMBINED BENEFIT TRUST, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit violate the Constitution and this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), by forcing Coltec Industries, Inc. ("Coltec"), after that decision, to pay premiums under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* ("Coal Act"), even though Coltec, like Eastern Enterprises, did not sign National Bituminous Coal Wage Agreements ("NBCWAs") in 1974 or thereafter?

2. Did the United States Court of Appeals for the Third Circuit violate the principles of separation of powers by disregarding the exclusive authority Congress gave to the Commissioner of Social Security to establish the basis for the assessment of premiums under the Coal Act?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

All of the parties to this proceeding are named in the caption. The B.F. Goodrich Company holds 10% or more of Coltec's stock, and Sanford C. Bernstein & Co., Inc. owns 10% or more of The B.F. Goodrich Company.

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The February 1, 2002 opinion of the Third Circuit Court of Appeals is reported at 280 F.3d 262 and appears in the Appendix to this Petition ("Appendix") at pp. 1a to 26a. The District Court's December 4, 2000 Memorandum Opinion and Order is reported at 184 F.R.D. 60 and appears at pp. 27a to 35a of the Appendix. The District Court's July 20, 2000, Memorandum Opinion and Order appears at pp. 36a to 42a of the Appendix. The District Court's January 25, 1999 Opinion and Order is reported at 184 F.R.D. 60 and appears at pp. 43a to 50a of the Appendix. The Third Circuit Court of Appeals' April 3, 2002 Order denying the petition for rehearing appears at pp. 61a to 62a of the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its opinion on February 1, 2002. A timely petition for rehearing was filed on March 18, 2002. The Court of Appeals entered its order denying the petition for rehearing on April 3, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent provisions of the Coal Act, 26 U.S.C. § 9701, *et seq.* are reprinted in the appendix at Appendix pp. 63a to 83a.

STATEMENT OF THE CASE

The courts below imposed liability for Coal Act premiums on Coltec despite this Court's earlier holding in *Eastern Enterprises*[1] that the application of liability under the Coal Act to companies similarly situated to Coltec was unconstitutional. In net effect, the Court of Appeals held that the *Eastern Enterprises* decision, as applied to Coltec, has only prospective effect, not retrospective effect, despite the fact that this case was open at the time of the decision in *Eastern Enterprises*, contrary to longstanding jurisprudence of this Court. Further, in disregard of the exclusive authority Congress gave to the Commissioner of Social Security ("the Commissioner"), the Court of Appeals forced Coltec to pay over $7 million in Coal Act premiums to the Respondent, United Mine Workers of America ("UMWA") Combined Benefit Fund ("the Fund"), despite the fact that the Commissioner had declared that all of Coltec's assignments of eligible beneficiaries under the Coal Act were void, which assignments are the basis of any calculation of premium liability under the Coal Act.

This case began in 1993 when, pursuant to the Coal Act, Coltec paid its first two monthly premium payments to the Fund under protest.[2] On November 23, 1993, Coltec (along with co-Plaintiffs) filed a Complaint, seeking, *inter alia*, declaratory and injunctive relief enjoining Respondents from collecting any further premiums from Coltec, on the basis that the Coal Act was unconstitutional as applied because Coltec completely withdrew from the coal industry prior to 1972 and after that date neither signed nor participated in any collective bargaining agreements with the UMWA.

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[1] 524 U.S. 498 (1998).

[2] A summary version of that complex procedural history has been presented here. A more detailed procedural history is set forth in the Court of Appeals decision at Appendix p. 1a.

During the pendency of this litigation, and prior to June 30, 1997, the issue of the constitutionality of the Coal Act was addressed by a number of Circuit Courts of Appeals, including the Third Circuit. *See e.g., Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997); *Holland v. Kennan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996), *cert. denied* 519 U.S. 808 (1996); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), *cert. denied sub nom, LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995). In each instance, the Courts of Appeals held that the Coal Act was constitutional, as applied to coal operators in substantially similar positions as Coltec in this action, and in at least three of these matters, the United States Supreme Court declined to review the Courts of Appeals' decisions.

On June 30, 1997, Coltec entered into a stipulation with the Respondents whereby, in exchange for Respondents' consent to the filing of a Second Amended Complaint challenging the bases and method of calculation of premiums assessed to Coltec, Coltec agreed to dismiss its constitutional claims ("the Stipulation"). Appendix pp. 53a-59a. The parties further stipulated that they would seek an Order from the District Court staying the case until such time as parallel litigation on the mathematic formula for the calculation of premiums, *National Mining Association v. Chater*, No. CV-96-N-1385-S (N.D.Ala.) (hereinafter "the NMA litigation"), was decided.

Pursuant to the Stipulation, as confirmed by order of the District Court, Coltec filed a Second Amended Complaint, which sought a declaration that the Respondents' method of calculating the health benefit component of the premium assessed to Coltec was incorrect and Coltec voluntarily dismissed its constitutional claims. Appendix pp. 53a-59a. At the time of the Stipulation, there had been no judicial finding that Coltec was liable for Coal Act premiums or any determination of the amount of such premiums. The case was then placed on administrative hold. Appendix p. 51a.

After the execution of the Stipulation and the voluntary dismissal of Coltec's constitutional claims, this Court accepted certiorari of *Eastern Enterprises v. Chater, supra*, under the caption *Eastern Enterprises v. Apfel*, 522 U.S. 928 (1997). The issues accepted for review by this Court included whether the Coal Act was constitutional as applied to a company in substantially the same circumstances as Coltec. On June 25, 1998, this Court issued its decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in which it held that the Coal Act, as applied to coal operators who were not signatories to the 1974 or later NBCWAs, was unconstitutional. Respondents have acknowledged that Coltec does not have prospective liability for Coal Act premiums for plan years after the *Eastern Enterprises* decision, but refuse to acknowledge the retroactive effect of that decision as applied to Coltec.

On July 23, 1998, Coltec filed three motions with the District Court as a result of this Court's holding in *Eastern Enterprises*, seeking to revive Coltec's constitutional claims. On January 25, 1999, the District Court issued a memorandum opinion and order denying all three motions. Appendix pp. 43a-50a.

On November 9, 1998, prior to any award or judgment in favor of Respondents and prior to the conclusion of the NMA litigation, *sua sponte* the Commissioner notified Coltec and the Fund that the assignments of coal industry retirees to Coltec were void. Appendix p. 84a (hereinafter "the SSA Letter"). Thus, Coltec filed a motion for limited reconsideration of the District Court's January 25, 1999 Order, which was denied on August 9, 1999.

On May 7, 1999, the parties to the NMA litigation settled all claims and defenses. Respondents subsequently filed a motion asking the District Court to direct Coltec to disburse escrowed premiums, along with accumulated interest, which was granted on July 20, 2000. Appendix pp. 36a-42a. Coltec was ordered to pay the amount of $7,281,808.89, plus interest, to the Respondents within 30 days (i.e., by August 19, 2000). Appendix pp. 36a-42a. This amount

was calculated by the Fund (and not by the Commissioner as required by the Coal Act, 26 U.S.C. § 9704) and accepted by the District Court after this Court's *Eastern Enterprises* decision and issuance of the SSA Letter.

Coltec filed a timely Notice of Appeal of that July 20, 2000 Order, and the July 20, 2000 Order is the second of the three orders that are at issue in this consolidated appeal.

Meanwhile, subsequent to the appeal of the July 20, 2000 Order, the District Court entered an order directing the parties to file motions to proceed with or dismiss any remaining claims. Although the District Court directed Coltec to pay to the Respondents the amount in controversy, the District Court had yet to address directly whether judgment could properly be entered in Respondents favor on any basis on any claim in this matter. In fact, Coltec was entitled to summary judgment with respect to every claim, and the District Court eventually so ruled.

Thus, Coltec filed a motion for summary judgment in which it asked the District Court to declare Coltec's premium liability under the Coal Act to be zero, but if the Court disagreed with the zero premium liability calculation, then to declare that the Respondents' method of calculating the premiums to be incorrect and to order the Respondents to recalculate the premiums collected from Coltec in accordance with the holding in *National Coal Association v. Chater*, 81 F.3d 1077 (11th Cir. 1996). By order dated December 4, 2000, the District Court granted Coltec's motion for summary judgment in part and held that Coltec is entitled to an offset of $152,717.92 from the $7,281,808.89 that the District Court found Coltec "currently owes defendants." Appendix p. 34a The District Court so ruled despite the fact that the Fund had no pending claim upon which relief could be granted against Coltec.

Coltec filed a timely Notice of Appeal of the December 4, 2000 Order. The appeals of the July 20, 2000 and December 4, 2000 Orders were consolidated by the Court of Appeals for the Third Circuit by Order dated January 9, 2001.

On February 1, 2002, the Court of Appeals affirmed the District Court in all respects holding, *inter alia*, that "[t]he Stipulation precludes Coltec from contesting its underlying liability for Coal Act premiums." Appendix p. 12a. Thus, in direct contravention of this Court's holding in *Eastern Enterprises* and the express determination of the Commissioner that any assignments of beneficiaries to Coltec under the Coal Act were void, the Court of Appeals found Coltec to be liable for Coal Act premiums. Coltec filed a timely Petition for Rehearing on March 18, 2002. The Court of Appeals entered its order denying the petition for rehearing on April 3, 2002. Rather than seek to stay the Court of Appeals' mandate, in accordance with that mandate and based upon the Fund's calculation of interest, which Coltec disputes, on May 3, 2002, Coltec paid the Fund $7,979,174.54 under protest.

REASONS FOR GRANTING THE WRIT

For the reasons explained below, in affirming the orders of the District Court, the Court of Appeals for the Third Circuit sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's supervisory power and decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS VIOLATED THE CONSTITUTION AND THIS COURT'S DECISION IN *EASTERN ENTERPRISES*.

Certiorari should be granted because the lower courts violated the Constitution and this Court's decision in *Eastern Enterprises* by forcing Coltec to pay Coal Act premiums even though Coltec, like Eastern Enterprises, did not sign NBCWAs in 1974 or thereafter. The lower courts' findings of Coal Act premium liability were based upon calculations for a period

prior to the *Eastern Enterprises* decision, but the finding of liability post-dated *Eastern Enterprises*. The Court of Appeals acknowledged in *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999), that this Court's *Eastern Enterprises* decision prohibits as unconstitutional the requirement of payment of Coal Act premiums from companies that stand in a substantially identical position to Eastern Enterprises, in that they did not sign NBCWAs in 1974 or thereafter. *See Unity*, 178 F.3d at 659.

There is no dispute in this case that Coltec did not sign or participate in the negotiations for the 1974 or subsequent NBCWAs, and Coltec completely withdrew from the coal industry prior to 1974. It is also undisputed that the Fund did not calculate the premiums and the lower courts did not order Coltec to pay Coal Act premiums to the Fund until after *Eastern Enterprises* was decided. Because Coltec stood in a substantially identical position to Eastern Enterprises, the lower courts violated the Constitution and this Court's decision in *Eastern Enterprises* in requiring Coltec to pay Coal Act premiums after *Eastern Enterprises* was decided.

Because this case was still pending when *Eastern Enterprises* was decided, *Eastern Enterprises* was applicable and could not be ignored. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) ("[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example to all pending cases, whether or not those cases involve predecision events.")(citing *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993).

Although Coltec previously stipulated to the dismissal of its constitutional claims, after this Court decided *Eastern Enterprises*, it was beyond the power of the lower courts to disregard the unconstitutionality of the relevant provisions of the Coal Act as to a pending case and require Coltec to pay Coal Act premiums pursuant to the specific provisions held unconstitutional as to companies such as Coltec. A party's voluntary dismissal of constitutional claims does not give a

court the power to impose liability on that party on a subsequent date pursuant to an unconstitutional statutory provision. It remains the obligation of a court to find a lawful basis before imposing liability. In requiring Coltec to pay Coal Act premiums, the lower courts disregarded this Court's decision in *Eastern Enterprises* and departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS EXCEEDED THEIR POWER, IN DISREGARD OF THE EXCLUSIVE STATUTORY AUTHORITY OF THE COMMISSIONER OF SOCIAL SECURITY.

Certiorari should be granted because the lower courts exceeded their power, in disregard of the exclusive statutory authority of the Commissioner, in ordering Coltec to pay over $7 million in Coal Act premiums to the Fund based on Coal Act assignments that were declared void by the Commissioner in recognition of the retroactive effect of this Court's holding in *Eastern Enterprises*.

A. The Commissioner has exclusive authority to assign eligible beneficiaries under the Coal Act.

Under the Coal Act, the Commissioner has the exclusive authority to assign coal industry eligible beneficiaries to signatory operators and related persons. *See* 26 U.S.C. § 9706(a). The Commissioner also has the exclusive authority to calculate premium rates under the Coal Act. *See* 26 U.S.C. § 9704(b). These two elements must exist before liability can attach to a signatory operator.

In contrast, the role of the Fund under the Coal Act is limited to activities such as: providing health care benefits and death benefit coverage to eligible beneficiaries (26 U.S.C. § 9703(b)(1) & (c)(1)); negotiating payment rates with health

care services plans (26 U.S.C. § 9703(b)(2)(A)); receiving payment of premiums from assigned operators (26 U.S.C. § 9704(a)); and establishing and maintaining accounts (26 U.S.C. § 9704(e)(1). The Fund (and the courts) lack the power to assign eligible beneficiaries, to calculate premium rates, or to otherwise create premium liability under the Coal Act.

B. The Commissioner had the power to declare Coltec's Coal Act assignments void.

The Commissioner had the power to declare Coltec's Coal Act assignments void. In November 1998, prior to any calculation of premium liability or award or judgment in favor of Respondents and prior to the conclusion of the NMA litigation, *sua sponte*, the Commissioner notified Coltec and the Fund that the assignments of eligible beneficiaries to Coltec were void. Appendix p. 84a.[3]

Because the Commissioner had the exclusive power to assign Coal Act eligible beneficiaries to Coltec, it clearly had the power to declare Coltec's Coal Act assignments void. "An agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) (Federal Power Commission properly imposed conditions on certificates of public convenience and necessity previously granted to gas producers and properly ordered producers to refund their customers). "[T]he freedom of agencies to correct mistakes is a matter of recognized importance in the cases." *Peoples Federal Savings and Loan Ass'n of Sidney v. Commissioner of Internal Revenue*, 948 F.2d 289, 305 (6th Cir. 1991) (new regulation that reversed old regulation was proper action to correct what Commissioner found to be a previous mistake).

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[3] The SSA Letter specifically stated as follows: "Pursuant to the June 25, 1998 Supreme Court decision in Eastern Enterprises v. Apfel, the assignments to Coltec Industries Inc under the provisions of the Coal Industry Retiree Health Benefit Act of 1992 are void." Appendix p.84a.

Administrative agencies have even greater discretion to correct their own legal mistakes identified by judicial review. *Verizon Telephone Companies v. Federal Communications Commission*, 269 F.3d 1098, 1111 (D.C.Cir. 2001) (in response to judicial review, FCC properly found local exchange carriers liable for improper end user common line charges, even though FCC had initially construed rules to allow such charges) (citing *United Gas Improvement Co.*). "The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have the opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

In addition, the Coal Act, at 26 U.S.C. § 9706(f)(3)(A), specifically provides that the Commissioner has the power to void assignments it determines to have been in error.[4] Accordingly, the Commissioner had the power to void Coltec's Coal Act assignments, as it did by the Commissioner's determination set forth in the SSA Letter.

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[4] 26 U.S.C. § 9706(f)(3)(A) provides:

> (A) Error. – If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error –
>
> > (i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary,
> >
> > ...

C. Because Coltec's Coal Act assignments were properly declared to be void, the lower courts did not have authority to impose Coal Act premium liability on Coltec.

The Coal Act provides that "[a]ll liability for contributions to the Combined Fund that arises on or after February 1, 1993, shall be determined exclusively under this chapter . . . ." 26 U.S.C. § 9708. The calculation of an operator's liability for premiums under the Coal Act in every case begins with a multiple of the number of eligible beneficiaries assigned to that operator by the Commissioner. *See* 26 U.S.C. § 9704. Based on the determination of the Commissioner, the number of eligible beneficiaries assigned to Coltec is zero. Thus, properly calculated, Coltec's premium liability is also zero.[5]

D. The decisions below should be reversed because they are not supported by the Coal Act, as interpreted by this Court, and they disregard the exclusive delegation of authority to the Commissioner, exceeding the bounds of judicial power.

The decisions below should be reversed because they are in violation of the Coal Act and disregard the exclusive delegation of authority by Congress to the Commissioner, exceeding the bounds of judicial power. Without finding the Commissioner to be in error under the Coal Act, the lower courts' actions and decisions ignored the clear language of the Coal Act as to how Coal Act premium liability is to be calculated and conflicted with the Commissioner's exclusive

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[5] Moreover, the Coal Act only requires "assigned operators" to pay premiums. *See* 26 U.S.C. § 9704(a) ("Each assigned operator shall pay to the Combined Fund . . ."). The Coal Act defines "assigned operator" to mean "the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706." 26 U.S.C. § 9701(c)(5).

authority and the Commissioner's proper exercise of that exclusive authority pursuant to the statutory scheme laid out by Congress in the Coal Act. In so doing, the lower courts so far exceeded the bounds of judicial power as to call for an exercise of this Court's supervisory power.

The lower courts gave only partial deference to the Commissioner's action in voiding Coltec's Coal Act assignments pursuant to this Court's *Eastern Enterprises* decision. The lower courts ordered Coltec to pay Coal Act premiums that would have been due prior to this Court's *Eastern Enterprises* decision, but not after.[6] Thus, they gave this Court's *Eastern Enterprises* decision and the Commissioner's determination in the SSA Letter prospective effect only. The Court of Appeals explained as follows:

> Coltec argues, however, that the [Escrow] Agreement and the Stipulation reference "Coal Act premiums" and that, in light of the SSA letter, it did not have any statutory liability at the time of the judgment. This argument is easily disposed because the premiums referred to in the Stipulation and the [Escrow] Agreement clearly refer to premiums due before *Eastern* was decided.

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[6] Respondents similarly acknowledged that Coltec does not have prospective liability for Coal Act premiums for plan years after the *Eastern Enterprises* decision, but refused to acknowledge the retroactive effect of that decision or the SSA Letter. At the same time, the Fund has been granting refunds of Coal Act premiums to companies that never contested the constitutionality of Coal Act premiums, while Coltec and at least 12 other companies that fought unconstitutional Coal Act premiums are either being denied refunds, *see Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 523 (6th Cir. 2001), or, as with Coltec, the Fund has pursued collection of premiums it deemed due prior to *Eastern Enterprises*.

Appendix, p. 25a.[7]

Clearly, this Court's *Eastern Enterprises* decision applies retroactively. *See Reynoldsville Casket Co., supra.* In accordance with that retroactive effect, the determination of the Commissioner in the SSA Letter that all of Coltec's Coal Act assignments are "void," was also intended to apply retroactively. "Void" means "having no legal force or binding effect." *See, e.g.*, BLACK'S LAW DICTIONARY 1573 (6th ed. 1990). "Void" does not mean having effect up to a certain time, but not thereafter.

The lower courts simply lacked the power to limit the effect of the Commissioner's determination that Coltec's Coal Act assignments are void or to interpret the Commissioner's determination not to apply retroactively, in contravention of the Commissioner's exclusive authority and in contradiction with the clear terms of the SSA Letter. Appendix p. 84a. The lower courts also were not free to disregard the clear language of the Coal Act as to how Coal Act premium liability is to be calculated.

Based on separation of powers principles, where a statute sets forth the measure of liability, a court is not free to apply a different measure. This Court stated in *Mobil Oil Corp. v. Higginbotham*:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. . . . we have

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[7] Of course, the Stipulation and Escrow Agreement were both drafted before *Eastern Enterprises* was decided, so neither reference the *Eastern Enterprises* decision in any way.

> no authority to substitute our views for those of Congress in a duly enacted statute.

436 U.S. 618, 625-626 (1978) (Death on the High Seas Act limited recovery to pecuniary loss such that plaintiffs could not recover additional damages under maritime law for loss of society).

In ordering Coltec to pay Coal Act premiums that would have been due prior to this Court's *Eastern Enterprises* decision, in violation of separation of powers principles, the lower courts and the Fund came up with a different method for calculating Coal Act premium liability than the method set forth in the Coal Act, and gave only partial, prospective effect to the Commissioner's determination that Coltec's Coal Act assignments are void.

E. Despite the fact that the Commissioner had declared Coltec's Coal Act assignments void, the courts below found Coltec liable for Coal Act premiums.

Despite the fact that the Commissioner declared Coltec's Coal Act assignments void, the courts below found Coltec liable for Coal Act premiums. The District Court disregarded the import of the Commissioner's determination that Coltec's Coal Act assignments are void solely on the unsupported basis that Coltec's reference to that determination was as an attempt to revive constitutional arguments, and accepted the Fund's calculation of Coal Act premiums based on the void assignments in requiring Coltec to pay over $7 million in premiums to the Fund.[8]

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[8] The District Court explained as follows:

> Plaintiffs argue that the calculation of an operator's liability for premiums under the Coal Act is a multiple of the number of coal industry retirees assigned to that operator by the Commissioner of Social Security. 26

The Court of Appeals affirmed the District Court in all respects holding, *inter alia*, that "[t]he Stipulation precludes Coltec from contesting its underlying liability for Coal Act premiums." Both the District Court and the Court of Appeals had it backwards; there must first be a basis for imposing liability before there is anything for a party to contest. The lower courts simply assumed liability without any basis and then refused to consider any objection from Coltec because of the Stipulation.

F. Neither the Stipulation nor the Escrow Agreement affected the Commissioner's power to void Coltec's Coal Act assignments, or altered the manner of calculation of premiums set forth in the Coal Act.

> U.S.C. § 9704. Because the number of coal industry retirees assigned to plaintiffs is zero, plaintiffs' premium liability is also zero. Dkt. 65, at 6. Consequently, plaintiffs argue, they owe defendants nothing. Although there is some logic to plaintiffs final argument, I reject it. First, as I previously held, even if the Eastern Enterprises decision, and the Commissioners['] letter issued in accordance with it, apply retrospectively[,] plaintiffs had "already traded away for consideration the right to litigate the constitutionality of their Coal Act assessments," dkt. no 56, by the time of the Eastern Enterprises decision. Additionally, plaintiffs have bargained away their right to haggle over the precise amount that they owe the defendants. The 1997 agreement [the Stipulation] between the parties clearly stated that the plaintiffs would accept the result in the NMA litigation if that result was favorable to them.

Appendix p. 41a. In fact, the Stipulation did not provide that plaintiffs would accept the result in the NMA litigation but rather provided: "if the said final judgment in the NMA litigation is favorable to plaintiffs in that case, then defendants here will afford plaintiffs in this case the same treatment of their new claim for relief in this action as is afforded to the plaintiffs in the NMA litigation." Appendix p. 5a.

The lower courts violated *Eastern Enterprises* and the clear language of the Coal Act by requiring Coltec to pay Coal Act premiums on the basis that Coltec and Respondents had entered into the Stipulation and Escrow Agreement. Neither the Stipulation nor the Escrow Agreement affected the Commissioner's power to declare Coltec's Coal Act assignments void, nor did the Stipulation or the Escrow Agreement so much as suggest that Coltec's liability for Coal Act premiums, if any, should be calculated in any manner other than the scheme as set forth in the Coal Act itself or without regard to the number of Coltec's Coal Act assignments as determined by the Commissioner.

Through the Stipulation, Coltec agreed to dismiss its claims challenging the constitutionality of the Coal Act. Appendix pp. 53a-59a. The Stipulation did not contain any admission of any liability, any agreement that Coltec would make premium payments, or any agreement that any Coal Act assignments of eligible beneficiaries or premium payments were valid or proper or that such assignments would remain effective despite any subsequent action by the Commissioner, nor did the Stipulation say that the Coal Act, as written and applied by the courts, would not apply to Coltec. *See* Appendix pp. 53a-59a The Stipulation further did not attempt to set forth any manner of calculation of Coltec's Coal Act premiums independent of the number of Coltec's Coal Act assignments.[9]

A court cannot go outside the confines of the Coal Act and, thus, avoid the holding of this Court so as to impose liability for Coal Act premiums, for the Coal Act itself is the

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[9] Likewise, the Escrow Agreement was not an admission of liability or an agreement to pay in and of itself, but rather an agreement to set aside money in the event that liability was separately established. The Escrow Agreement was never intended to sidestep the need to establish liability for premiums under the Coal Act in the first place, did not contain any agreement that Coltec's Coal Act assignments would remain effective despite subsequent action by the Commissioner, and did not attempt to set forth any manner of calculation of Coltec's Coal Act premiums.

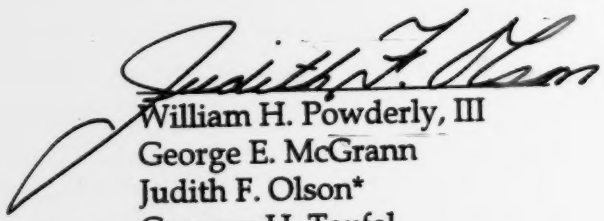
exclusive basis for establishing liability for such premiums. 26 U.S.C. § 9708. Thus, without justification, the lower courts have disregarded statutory dictates, the exclusive authority of the Commissioner, and the guiding relevant precedents of this Court, and, ultimately, have violated the separation of powers doctrine, by crediting a liability that this court has said Congress cannot do as to call for the exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons, Petitioner, Coltec Industries, Inc. requests that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Date: July 1, 2002



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APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2458, No. 00-4385

COLTEC INDUSTRIES, INC., a Pennsylvania Corporation; FOUR LEAF COAL COMPANY, INC., a Tennessee Corporation; L.G. WASSON COAL MINING CORP., an Indiana Corporation

v.

WILLIAM P. HOBGOOD; MICHAEL H. HOLLAND; MARTY HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARLTON R. SICKLES; GAIL R. WILENSKY, as TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED FUND; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; UNITED STATES OF AMERICA (Intervenor in D.C.); Coltec Industries, Inc., Appellant

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[Argued: Sept. 19, 2001
Opinion filed: Feb. 1, 2002]

Before: SLOVITER, NYGAARD and McKEE, Circuit Judges.

SLOVITER, Circuit Judge:

In this appeal, Coltec Industries, Inc. ("Coltec") seeks to extricate itself from its voluntary dismissal with prejudice of its claim against the United Mine Workers of America Combined Benefit Fund and its trustees (collectively "the Fund") that asserted that the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), *26 U.S.C. § § 9701*-9722(2001), was unconstitutional. Subsequent to that dismissal, the Supreme Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118

S. Ct. 2131 (1997), declared the Coal Act unconstitutional as applied to companies in situations similar to Coltec. Coltec then filed motions in the District Court under Federal Rule of Civil Procedure 60(b) seeking to reinstate its constitutional claims. The District Court viewed Coltec as seeking to escape the effects of its earlier agreements in order to benefit from the ruling in Eastern and denied Coltec's attempt to reassert its constitutional claims or to have its liability for Coal Act premiums reduced to zero. The District Court also ordered Coltec to pay to the Fund $ 7,129,090.97 in premiums and interest. Coltec appeals the rulings of the District Court.

I.

BACKGROUND

Congress enacted the Coal Act to resolve the imminent insolvency of multi-employer trusts created by coal-industry agreements to provide health benefits for coal miners and their dependents. The background of the Coal Act is thoroughly reviewed in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-14, 118 S. Ct. 2131 (1997), and thereafter in *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 653-54 (3d Cir. 1999), and in *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 521-22 (6th Cir. 2001). We thus summarize only the particular provisions and facts relevant to the case before us.

The Coal Act merged existing trusts into the appellee United Mine Workers of America Combined Benefit Fund and charged the Fund's trustees with collecting premiums from the former employers of eligible retirees and using those premiums to pay the retirees' benefits. Under the Act, the Commissioner of Social Security assigns retirees to their former employers, and the Fund charges premiums based on these assignments.

Coltec was assigned 249 retirees as of February 1, 1993, and the Fund assessed premiums against the company, which

made its first two monthly payments (totaling $139,496.36), under protest.[1] App. at 232. That November, Coltec and two other companies, Four Leaf Coal Co. and L.G. Wasson Coal Mining Corp., sued the Fund seeking declaratory and injunctive relief (including a contemporaneous motion for a temporary restraining order) from further assessments of Coal Act premiums against them. App. at 19-42. The first four counts of the complaint claimed that the Act was unconstitutional as applied to them under the Fifth Amendment's takings and due process clauses because the plaintiff companies had not signed the relevant agreements. They later added a fifth count alleging errors in the assignments of beneficiaries to them.

In December 1993, the parties executed an agreement (the "Agreement"), App. at 236-37, under which the plaintiffs agreed to withdraw their request for a temporary restraining order. Coltec agreed to establish an escrow account into which it would deposit all premiums due during the pendency of its preliminary injunction motion. The terms were established in a contemporaneous separate written agreement (the "Escrow Agreement"). App. at 232-35. In return, the Fund agreed to deem Coltec's payments into escrow as payments to the Fund and not to treat the other plaintiffs' failure to pay as a default.[2] The Agreement provided that the escrow funds, plus interest, would be disbursed to the Fund if the injunction motion was denied or to Coltec if it was granted.

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[1] Coltec paid under protest on the ground that the Coal Act was unconstitutional as applied to it because it did not participate in the negotiations for the 1974 or any subsequent National Bituminous Coal Wage Agreements and did not in any other way agree to make contributions under these agreements. App. at 24.

[2] Although the complaint was filed by all three coal companies as plaintiffs, and they all entered into the Agreement (but not the Escrow Agreement), depending on the context we will refer only to Coltec as its claims are the only ones at issue in this appeal.

In January 1994, the Fund answered the complaint and counterclaimed, seeking, *inter alia*, a declaration that the Coal Act was constitutional. Later that month, the United States intervened to defend the Act's constitutionality. In May 1996, Coltec and the other two plaintiffs withdrew their preliminary injunction motion, and the District Court dismissed that motion. App. at 126.

Meanwhile, several courts of appeals, including this one, held that the Coal Act was constitutional as applied to coal operators similarly situated to Coltec. *See Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996); *Blue Diamond Coal Co. v. Shalala (In re Blue Diamond Coal Co.)*, 79 F.3d 516 (6th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir. 1995). The Supreme Court had denied certiorari in *Blue Diamond*, 519 U.S. 1055, 117 S. Ct. 682 (1997), *Davon*, 519 U.S. 808, 117 S. Ct. 50 (1996), and *Chateaugay*, 516 U.S. 913, 116 S. Ct. 298 (1995). Constitutional challenges by other coal companies were still pending when the plaintiff companies initiated settlement negotiations with the Fund. *See, e.g., Eastern Enterprises*, 110 F.3d 150, *rev'd*, 524 U.S. 498, 118 S. Ct. 2131 (1998); *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366 (E.D. Va. 1997), *rev'd*, 164 F.3d 624 (4th Cir. 1998).

On June 30, 1997, prior to the resolution of the pending constitutional challenges in other cases, the parties in this case signed a stipulation (the "Stipulation") which referenced a decision by the Alabama federal court that resolved a dispute as to the amount of premiums to be assessed under the Coal Act. That decision was affirmed by the Eleventh Circuit. *National Coal Ass'n v. Chater*, 1995 U.S. Dist. LEXIS 21125, No. CV94-H-780-S, 1995 WL 1052240 (N.D. Ala.), *aff'd*, 81 F.3d 1077 (11th Cir. 1996) ("*NCA*"). The Stipulation also referenced the then-pending follow-up case, *National Mining Ass'n v. Chater*, No. CV-96-N-1385-S (N.D. Ala. 1996) ("*NMA*"), in which coal

companies sought a refund of the differential between the amount they had paid over a period of several years and the amount they would have paid under the *NCA* formula (the "premium differential"). The Stipulation stated:

> plaintiffs seek either to obtain the benefits of the *NMA* litigation, should the outcome be favorable to the plaintiffs in that action, or to retain the right to litigate the issue themselves should the outcome of the *NMA* litigation be unfavorable to the plaintiffs in that case.

App. at 128.

Specifically, the Stipulation provided that: (1) plaintiffs would amend their complaint to state a new claim seeking the premium differential, (2) defendants would not oppose this amendment, (3) plaintiffs would dismiss with prejudice their five existing claims, (4) the parties would ask the court to stay the premium differential claim pending resolution of the *NMA* litigation, and (5) upon a final judgment in *NMA*:

> a) if the said final judgment ... is favorable to plaintiffs in that case, then [the Fund] will afford plaintiffs in this case the same treatment of [its] new claim ... as is afforded to the plaintiffs in the *NMA* litigation; and b) if the said final judgment ... is favorable to defendants in that case, the stay imposed on the new claim for relief ... will be lifted, and plaintiffs will be free to pursue that claim ... and [the Fund] will be free to defend ... against that claim.

App. at 129-30. In other words, the plaintiff companies would get the benefit of any decision determining that their premiums should have been lower but could litigate that point if the Alabama court found otherwise. Pursuant to the

Stipulation, the plaintiff companies amended their complaint to include a new sixth count that concerned the premium differential issue, App. at 132-38, 147-53, and dismissed the first five counts with prejudice. The District Court "so ordered" the Stipulation on July 2, 1997. The District Court then granted the parties' joint motion to stay this case pending the resolution of *NMA*.

On October 20, 1997, the Supreme Court granted certiorari from the decision of the Court of Appeals for the First Circuit holding the Coal Act constitutional. *Eastern Enterprises v. Apfel*, 522 U.S. 931, 118 S. Ct. 334 (1997) (granting writ of certiorari). On June 25, 1998, the Court found the Coal Act unconstitutional as applied to companies which had not signed relevant coal-industry agreements. *Eastern*, 524 U.S. 498, 118 S. Ct. 2131 (1998). The decision in *Eastern* was "splintered." *Unity Real Estate Co.*, 178 F.3d at 658. Five Justices found the Act unconstitutional as applied to companies who, like Eastern and Coltec, had not signed the relevant coal-industry agreements. Only four of those Justices believed that, applied to such companies, the Act was an unconstitutional taking, *Eastern*, 524 U.S. at 529-37 (plurality opinion), while the fifth believed the Act violated due process but was not a taking, *id.* at 539-50 (Kennedy, J., concurring and dissenting). The other four Justices would have held that the Coal Act was constitutional as applied to such companies. *Id.* at 550-53 (Stevens, J., dissenting); *id.* at 553-68 (Breyer, J., dissenting).

Shortly after *Eastern* was decided, the plaintiff companies in this case filed three motions in an attempt to avoid Coal Act liability. The first motion requested leave to file a new complaint restating the dismissed constitutional claims and altering the sixth count to claim zero premium liability. The second asked for relief under Federal Rule of Civil Procedure 60(b)(5) or (6) from the dismissal of the first five counts of the complaint which challenged the constitutionality of the Coal Act. The third motion sought to lift the stay of count six (the premium differential). App. at

155-87. On November 9, 1998, while the motions were pending, the Social Security Administration wrote to Coltec voiding Coltec's assignments in light of *Eastern* (the "SSA letter"). App. at 201.

The District Court denied the three motions on January 25, 1999. App. at 188-95. The District Court held that the Eastern decision did not provide a basis for relieving Coltec of the consequences of its bargain. The court also denied Coltec's subsequent motion for "limited reconsideration" based on the SSA letter, finding that the letter, which Coltec received before the January order, was not new evidence, and that Coltec's reliance on the letter was merely another attempt to reassert the claims it had bargained away. App. at 204.

In May 1999, the *NMA* parties reached a settlement with the Fund under which the Fund agreed to pay back the premium differential without interest. Supp. App. at 388-93. The Fund, which had agreed in the Stipulation to give Coltec the benefit of *NMA* if the coal companies were successful in that litigation, offered to offset Coltec's premium differential against Coltec's release of the escrow money, but Coltec denied any liability. Supp. App. at 394-95, 400-03. The Fund then filed a motion asking the District Court to order disbursement of the funds that were believed to be in escrow, App. at 219-20, at which time Coltec first revealed that it had not in fact established an escrow account as it had represented. App. at 287-88. The District Court granted the Fund's motion on July 20, 2000 and ordered Coltec to pay directly to the Fund over $7 million in premiums and interest[3] which should have been in escrow. App. at 297-303. Coltec timely appealed.[4]

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[3] The order allowed Coltec to offset its payment by the amount of the premium differential (approximately $ 150,000).

[4] We need not decide if we have jurisdiction over that appeal because it has been consolidated with Coltec's later appeal of the final judgment.

Thereafter, the District Court directed the parties to file dispositive motions.[5] It ruled on those motions on December 4, 2000, issuing a final judgment dismissing the Fund's counterclaims as moot and granting Coltec summary judgment on its premium differential claim. App. at 370-78. Specifically, the District Court found that Coltec had made a bargain to forego all challenges to its underlying Coal Act premium liability in exchange for the opportunity to (1) claim the premium differential and (2) gain the benefit of a favorable *NMA* result while (3) retaining the right to litigate the premium differential issue itself should the *NMA* outcome be unfavorable to its position.

The court also reiterated its understanding of the parties' deal when it granted the Fund's motion to order disbursement of the escrow funds. It rejected Coltec's argument that the Fund had no right to premiums due to the SSA letter, treating it as another effort by Coltec to renege on its concession of liability in the Stipulation. In response to Coltec's argument that the Agreement required denial of Coltec's initial injunction motion to trigger disbursement of the escrow to the Fund, the District Court found that Coltec's withdrawal and its dismissal of its injunction motion satisfied this condition. Morever, the court held that Coltec's failure to make the agreed upon payments into escrow did not excuse its obligation to pay the amount that should have been (and was represented to be) in escrow.[6]

The District Court held that because the *NMA* result was undisputedly favorable to Coltec, the Stipulation limited

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[5] Around this time, Four Leaf and Wasson settled with the Fund, although the District Court acknowledged that nothing had been entered into the record regarding these settlements. App. at 314, 371 n.2.

[6] We note our surprise that there is no reference in the record to any sanction imposed by the District Court on Coltec or its attorney for what appears to be years of falsely representing the establishment and existence of an escrow fund, although the District Court did find the conduct "troubling." App. at 302 n.1.

the relief to that afforded the *NMA* plaintiffs, which necessarily meant that count six was limited to the premium differential and that Coltec could not use count six as a vehicle for recalculating its premiums to zero. The court did award Coltec a $ 152,717.92 offset against the money it owed the Fund and stayed the judgment pending Coltec's appeal, which this court consolidated with the company's earlier appeal.[7]

II.

JURISDICTION AND STANDARD

The District Court had federal question jurisdiction and this court has jurisdiction under 28 U.S.C. § 1291. The parties disagree as to the standard of review we should apply to the District Court's treatment of the Stipulation, with the Fund advocating a clearly erroneous standard and Coltec advocating a plenary standard. We note that our result in this case would be the same under either standard. This court applies plenary review to a district court's construction of settlement agreements, but should review a district court's interpretation of settlement agreements, as well as any underlying factual findings, for clear error, as it would in reviewing a district court's treatment of any other contract. *See, e.g., In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 193 (3d Cir. 2000) ("Basic contract principles ... apply to settlement agreements [and] ... contract interpretation is a question of fact, [thus] ... review is according to the clearly erroneous standard. In contrast, contract construction, that is, the legal operation of the contract, is a question of law mandating plenary review."). We review the denial of Rule 60(b) relief for

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[7] On March 27, 2001, the Fund wrote to Coltec and Wasson, offering a partial refund of the premiums they had paid, pursuant to a fund set up by Congress for partially reimbursing companies in their position in the wake of *Eastern*. Letter from George E. McGrann, Attorney for Coltec, to the Court (May 9, 2001) (enclosing letter from Carl F. Tennille, Comptroller for Health and Retirement Funds (March 27, 2001)) (on file in Clerk's office).

an abuse of discretion. *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 653 (3d Cir. 1998).[8]

III.

DISCUSSION

On appeal, Coltec makes several challenges to the District Court's rulings. Primarily, however, the company asserts that the District Court misinterpreted the Stipulation, abused its discretion in denying the Rule 60(b) motion, and had no basis to award money to the Fund. Coltec seeks reversal of the $7,129,090.97 award to the Fund and asks us to instruct the District Court to order the Fund to refund the two premiums Coltec paid, with interest. In the alternative, Coltec asks this court to remand for another recalculation of its premium differential, but it does not respond to the Fund's assertions (1) that Coltec waived this issue by not raising it in the District Court and (2) that the credit is correctly calculated. The Fund defends the District Court's understanding of the parties' agreement and, along with the United States, asserts that the court properly denied Rule 60(b) relief.[9]

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[8] Coltec suggests review is plenary when a district court does not exercise its discretion, citing, inter alia, *Twelve John Does v. District of Columbia*, 268 U.S. App. D.C. 308, 841 F.2d 1133, 1138 (D.C. Cir. 1988), for the proposition that a denial of Rule 60(b) relief should be reversed if it is based on an error of law. This is consistent with the abuse of discretion standard. *See, e.g., Stokors S.A. v. Morrison*, 147 F.3d 759, 761 (8th Cir. 1998) ("A district court necessarily abuses its discretion if it bases its decision on an erroneous view of controlling law."). Coltec also argues courts have no discretion to deny a Rule 60(b) motion which is based on the unconstitutionality of the underlying judgment. *See Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978). The language Coltec relies on is dictum. This court reviewed such a denial for abuse of discretion in *Marshall v. Board of Education*, 575 F.2d 417, 422-24 (3d Cir. 1978).

[9] The United States takes no position regarding the money judgment. Br. of United States at 10 n.1.

A. *Coltec's Coal Act Liability*

Coltec contends that it should prevail on this appeal even without the constitutional claims it voluntarily dismissed because its Coal Act liability is zero. Coltec argues that in light of the Stipulation the District Court abused its discretion in declining to lift the stay on count six and erred in holding that its resolution of that count was limited to the two options in the Stipulation.

It is manifest that Coltec explicitly agreed in the Stipulation to dismiss with prejudice its first five counts, which stated constitutional challenges to the Coal Act and a statutory challenge to the company's assignments, thereby forfeiting these avenues of contesting its underlying liability. The District Court "so ordered" the Stipulation and the related dismissal and stay orders. In exchange for Coltec's abandonment of its challenges to its liability, the Fund agreed that Coltec could challenge the amount of its assessments by adding "a new claim for relief that will seek to reduce, by the amount of the premium differential [from *NCA*], the Coal Act premiums assessed against plaintiffs by [the Fund]." App. at 129. The plain language of the Stipulation thus confined the scope of this new sixth count.

Coltec clearly understood this because its sixth count was narrowly drawn, alleging only that certain offsets due under the Coal Act were under-calculated, resulting in the premium differential, and requesting that the court order the Fund to recalculate its pre-1996 premiums according to the *NCA* method[10] and release the premium differential plus interest to Coltec from the company's payments in escrow. As contemplated by the Stipulation, the sixth count did not challenge either Coltec's assignments or its underlying premium liability based on these assignments.

Moreover, the Stipulation restricted the District Court's ultimate resolution of the sixth count. It provided that the

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[10] From 1996 on, the Fund assessed all premiums according to *NCA*.

parties would ask to stay count six pending the resolution of *NMA* and then, if the resolution was favorable to the *NMA* plaintiffs, the Fund would give Coltec the same treatment regarding its premium differential claim as the *NMA* plaintiffs received.[11] It also provided that if the outcome were favorable to the Fund, the stay on the sixth count would be lifted and the parties would be free to litigate the premium differential issue. The District Court's stay order recited this language. App. at 145-46. By voluntary agreement and subsequent court order, Coltec's sole remaining cause of action is confined to seeking the premium differential which the Fund has offered Coltec. The Stipulation precludes Coltec from contesting its underlying liability for Coal Act premiums. For this reason, Coltec cannot use count six to state a claim for zero liability or to request a refund of its two premium payments, and nothing in the SSA letter requires otherwise. Thus, the District Court did not abuse its discretion in failing to lift the stay and properly denied Coltec's summary judgment request for relief beyond that afforded the *NMA* plaintiffs.

B. *Coltec's Rule 60(b) Motion*

"The general purpose of Rule 60(b) ... is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978). Coltec contends that the denial of relief in this case was an abuse of discretion and that relief is warranted under either Rule 60(b)(5) or 60(b)(6). The relevant portions of the rule provide:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal

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[11] On appeal, Coltec does not contest that under the Stipulation the settlement terminating the *NMA* case was a resolution favorable to the *NMA* plaintiffs.

> representative from a final judgment, order, or proceeding for the following reasons: ...
>
> > (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> >
> > (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60.[12] Coltec based its motion in the District Court for relief from the dismissal with prejudice of the first five counts of its complaint on these subsections, and now appeals the District Court's denial of this motion.

1. *Subsection (5)*

This court has held that "the definitional limitation in subsection (5) is significant in that it empowers a court to modify a judgment only if it is 'prospective,' or executory." *Marshall v. Bd. of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978). The District Court held that its dismissal with prejudice of the first five counts does not satisfy the "prospective" requirement of this section. Coltec argues that because there was no money judgment against it at the time of its Rule 60(b) motion, an order allowing it to reassert its constitutional claims would

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[12] The United States argues that Coltec's Rule 60(b) motion is moot because the motion seeks to reinstate claims challenging the constitutionality of the Coal Act despite the fact that the government has already declared Coltec's assignments void and agreed that further assessments against Coltec are inappropriate. However, if we found the District Court abused its discretion in denying Coltec's request for Rule 60(b) relief, it could affect Coltec's right to the premium payments it made (and was supposed to put in escrow). So, while the question of the Act's constitutionality as applied to Coltec may be moot, Coltec's appeal of the denial of its Rule 60(b) motion is not.

have resulted in a finding that it had no Coal Act liability, which would have given it relief from the prospective application of the Stipulation. It asserts that, therefore, the District Court's finding that the dismissal was not prospective was erroneous and that the court abused its discretion by failing to weigh the equities of the company's motion.

As an initial matter, Coltec's motion asked for relief from the dismissal order, not from the Stipulation. Courts have generally held that dismissals with prejudice are not prospective within the meaning of Rule 60(b)(5). *See, e.g., Maraziti v. Thorpe,* 52 F.3d 252, 254 (9th Cir. 1995); *Schwartz v. United States,* 976 F.2d 213, 218 (4th Cir. 1992); *Picco v. Global Marine Drilling Co.,* 900 F.2d 846, 851 (5th Cir. 1990); *Twelve John Does v. District of Columbia,* 268 U.S. App. D.C. 308, 841 F.2d 1133, 1139-40 (D.C. Cir. 1988). Coltec cites no authority to the contrary. Instead, Coltec argues that the prospective effect of the dismissal prevents it from reasserting its constitutional claims and defenses. However, as the government notes, this collateral estoppel effect is common to all judgments. If this were enough to satisfy Rule 60(b)(5)'s threshold requirement, then the Rule's requirement of "prospective application" would be meaningless.

Numerous courts have explicitly rejected this argument. *See, e.g., Maraziti,* 52 F.3d at 254 ("The construction ... to the effect that a judgment has prospective effect so long as the parties are bound by it, would read the word 'prospective' out of the rule.") (quotation omitted); *Picco, 900 F.2d at 851* ("The only arguably prospective effect of the ... dismissal is that it precludes relitigation of the issues decided, which clearly is not enough."); *Gibbs v. Maxwell House,* 738 F.2d 1153, 1156 (11th Cir. 1984) ("That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money judgment against him.").

Coltec asserts that the prospective effect it describes is narrower than the collateral estoppel effect at issue in the

above cases because the dismissal in this case was executory. This differs, it contends, from the judgment for monetary damages that had been paid and which this court determined was not prospective in *Marshall*, 575 F.2d 417.[13] However, although the court in Marshall sustained the denial of Rule 60(b) relief when the judgment had already been satisfied, the court explicitly noted that even if the judgment had not yet been satisfied, it would not qualify as prospective under Rule 60(b)(5) because "[a]'prospective' injunction envisions a restraint of future conduct, not an order to remedy past wrongs when the compensation payment is withheld from the beneficiaries until some subsequent date." *Marshall*, 575 F.2d at 425 n.27.

In fact, all of the cases Coltec cites which granted Rule 60(b)(5) relief involved injunctions or consent decrees regulating ongoing behavior. *See Agostini v. Felton*, 521 U.S. 203, 212, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) (injunction preventing certain manner of delivering publicly funded services to parochial school students); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 374-75, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992) (consent decree mandating construction of new prison according to specific guidelines); *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1251 (9th Cir. 1999) (injunction mandating use of specific rent-subsidy calculation method); *Marshall*, 575 F.2d 417, 419 (injunction requiring compliance with federal wage-and-hour law).

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[13] Coltec also analogizes the District Court's interpretation of the Stipulation in this case to the judgment in *United States v. Kayser-Roth Corp.*, 103 F. Supp. 2d 74, 79-80 (D.R.I. 2000) (judgment prospective as to damages when it fixed liability for waste clean-up but left amount of liability dependent on future events). But, as noted above, Coltec's Rule 60(b) motion sought only to vacate the dismissal, not the Stipulation.

Coltec's point that judgments are prospective when they are executory is not in dispute.[14] There was nothing executory about the dismissal with prejudice of counts one through five. Even though there was no money judgment against Coltec at the time of its motion, it had previously assured the District Court that it was depositing into the escrow account the Coal Act premiums as they were due. *See, e.g.*, App. at 151 ("Plaintiffs have held under escrow certain sums assessed to them for premiums for plan years February 1, 1993, October 1, 1993, and October 1, 1995."); App. at 170 (same); and App. at 198 ("[Coltec] has paid its Coal Act assessments since 1993 into an escrow account pending the resolution of the respective rights of the parties, and such monies remain in escrow. This escrow fund contains several million dollars."). It is disingenuous -- in light of Coltec's multiple false statements to both the District Court and the Fund about its escrow payments -- for Coltec to attempt to use its failure to make the promised payments to its own advantage. Therefore, the District Court did not abuse its discretion in finding that the dismissal did not satisfy Rule 60(b)(5)'s threshold requirement of prospective effect.

2. *Subsection (6)*

Rule 60(b)(6) is a catchall provision which allows a court to relieve a party from the effects of an order for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). However, "this court has consistently held that the Rule 60(b)(6) ground for relief from judgment provides for extraordinary relief and may only be

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[14] The United States cites a series of cases in support of this proposition. *See, e.g., Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 630 (7th Cir. 1997) (finding judgment not prospective that interpreted contract and continued to affect rights and duties of parties, and stating "judgments are prospective when they are 'executory' or 'involve the supervision of changing conduct or conditions.' ") (quoting *Twelve John Does*, 841 F.2d at 1138); *Maraziti*, 52 F.3d 252, 254 (same).

invoked upon a showing of exceptional circumstances." *In re Fine Paper Antitrust Litig.*, 840 F.2d 188 (3d Cir. 1988) (quotation omitted); *see also United States Steel Corp. v. Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir. 1979); *Marshall v. Board of Educ.*, 575 F.3d 417, 425.

In rejecting Coltec's Rule 60(b)(6) motion, the District Court relied in large part on the fact that a change in law subsequent to the challenged order rarely justifies Rule 60(b)(6) relief. *See Agostini*, 521 U.S. at 239; *Cincinnati Ins. Co.*, 131 F.3d at 628-29; *Marshall*, 575 F.3d at 425-26. In addition, as to the equities of Coltec's motion, the District Court found the company was trying to escape the effects of a bargain it regretted in hindsight and held that there were no exceptional circumstance that would justify allowing Coltec to renege on its deal.

Coltec acknowledges that its decision voluntarily to dismiss its constitutional claims is an equitable factor militating against Rule 60(b)(6) relief,[15] but argues that the District Court abused its discretion by giving determinative weight to this factor. Likewise, Coltec concedes that a change in decisional law is not alone sufficient to justify Rule 60(b) relief, but contends that the District Court abused its discretion by erroneously concluding that a change in law cannot support such relief and declining further to consider the equities of the company's motion. Coltec underscores that the new law in this case was a Supreme Court decision based on a finding of unconstitutionality.

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[15] Alternatively, Coltec appears to argue that the fact the court did not consider the merits of its constitutional claims in granting the dismissal at issue militates in favor of Rule 60(b) relief, citing *Lasky v. Continental Products Corp.*, 804 F.2d 250, 256 n.10 (3d Cir. 1986) ("If relief is sought from a default judgment or a judgment of dismissal where there has been no consideration of the merits, [the court should consider] whether in the particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgments, and whether there is merit in the defense or claim, as the case may be.") (quotation omitted).

In light of the voluminous case law mandating a high hurdle for Rule 60(b) relief from consensual orders, *see, e.g., Rufo*, 502 U.S. at 383, *Bellevue*, 165 F.3d at 1253 n.4, *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979), this dictum from Lasky is better understood as applying to adjudications on procedural grounds rather than consensual orders like the dismissal in this case.

In its ruling denying Rule 60(b) relief, the District Court noted that decisional law cannot alone justify such relief and that Coltec had consented to the dismissal. *See, e.g.*, App. at 190 ("Failing to litigate to its conclusion a matter that could have been pursued ... all the way to the Supreme Court does not constitute an exceptional circumstance."); App. at 193 ("[A] change in the decisional law after judgment is entered ... is not considered exceptional and does not justify relief."). However, the District Court considered other equitable factors in the remainder of its opinion, most notably the content and context of the parties' agreement leading to the dismissal. Even if the District Court could have been more explicit in its analysis of the equitable factors, it did not abuse its discretion, particularly since it focused on the principal issue of whether Coltec should be excused from the effects of a deal it voluntarily made.

For purposes of an equitable analysis, the dismissal in this case should be viewed in the context of the Stipulation which precipitated it. As the District Court noted, the parties to the Stipulation clearly knew how to provide for contingencies such as future case law (*i.e., NMA*) and knew that there were still pending constitutional challenges to the Coal Act. Coltec decided not to condition the dismissal of its constitutional claims on the ultimate outcome of these challenges, but deliberately forfeited its still viable constitutional claims, apparently because it believed they were unlikely to be successful in light of then-existing case law. It did so in exchange for valuable consideration in the form of a chance to pursue without litigation its premium differential claim, which it presumably believed it had a better chance of

winning. In retrospect in light of the Supreme Court's decision in Eastern, Coltec may wish that it had not made this deal, but courts have not looked favorably on the entreaties of parties trying to escape the consequences of their own "counseled and knowledgeable" decisions. *Fine Paper*, 840 F.2d at 195.

Coltec's situation is analogous to the circumstances of other Rule 60(b) movants whose motions courts have denied in large part because of their deliberate decisions not to appeal unfavorable adjudications. *See, e.g., id. at 188* (involving attorneys who chose not to appeal fee award others appealed); *Marshall*, 575 F.2d at 420 (involving school board that paid judgment after appeal rather than petitioning for certiorari). The Supreme Court addressed this situation in *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209 (1950), which involved the denaturalization of two naturalized German citizens during World War II. For monetary reasons, Ackermann declined to appeal, believing the issue would be resolved after the war. When the appeal of his brother-in-law, Keilbar, was successful, Ackermann filed for Rule 60(b) relief from his denaturalization. The Supreme Court held such relief was appropriately denied, explaining:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Id. at 198.

Likewise, even if Coltec's decision to settle was improvident in hindsight, the decision has been made and cannot be revisited. *Cf. Schwartz*, 976 F.2d at 218 ("We find no meaningful distinction between a motion asking for relief from a decision not to appeal, as in Ackermann, and one that asks for relief from a decision to settle, as in this case."). The Court contrasted Ackermann's case to that of the successful Rule 60(b) petitioner in *Klapprott v. United States*, 335 U.S. 601, 93 L. Ed. 266, 69 S. Ct. 384 (1949), who also had failed to defend denaturalization charges but who had been in custody, sick, unable to procure counsel despite efforts to do so, and preoccupied by efforts to protect himself against grave criminal charges. *Ackermann*, 340 U.S. at 199-200. The Court observed, "By no stretch of imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the Klapprott situation." *Id. at 200.* The District Court did not err in determining that Coltec similarly must bear the consequences of its informed, counseled and voluntary decision.

Our decision in *Boughner*, 572 F.2d 976, which Coltec cites, granting Rule 60(b) relief, is distinguishable from the facts of the present case. The Boughner appellants had lost summary judgment motions because their attorney, who failed to file opposing papers, was inexcusably negligent. *Id.* at 977. Coltec, unlike these litigants, deliberately chose to negotiate away its constitutional claims while actively represented by competent counsel.

Coltec also argues that it should not be punished for serving the interests of judicial economy by bowing to the weight of then-existing decisional law holding the Coal Act constitutional instead of continuing constitutional litigation would have been borderline frivolous. It appeals to this court's sense of justice, claiming that it is fundamentally unfair for it to be forced to pay unconstitutional Coal Act premiums when the government has waived the premiums of companies that had not yet paid the premiums and refunded premiums of companies that settled before *Eastern*. *See Blue Diamond Coal*

Co. v. Trustees of the UMWA Combined Benefit Fund, 249 F.3d 519, 523 (6th Cir. 2001).

The Fund responds that Coltec is not similarly situated to the companies that did not settle because Coltec got the benefit of its bargain and, had *Eastern* turned out differently, it might have been in a better position than companies that did not settle. We agree. Enforcing Coltec's bargain is not a punishment and is not unfair. Moreover, this court has already rejected such disparate treatment of "similarly" situated parties as a basis for Rule 60(b) relief. We stated, "The only showing made in support of Rule 60(b) relief in this case is that litigants who pursued appellate remedies fared better than litigants who did not. The *Marshall* case explicitly forecloses Rule 60(b) relief on that ground." *Fine Paper*, 840 F.2d at 194.

The United States further contends that if Coltec prevails, the government will have no incentive to settle constitutional cases. The government persuasively argues that if Coltec is allowed to renege on the Stipulation and the Agreement, then:

> any settlement involving the abandonment of constitutional claims would be illusory [and] any party that bargained away constitutional claims that later turned out to have merit could renege on its agreement. As a result, the United States would have no incentive to enter into settlement agreements in [such] cases, and litigants would lose the ability to trade constitutional claims -- even highly questionable ones -- for valuable consideration. [Further,] ... the courts would be inundated with constitutional claims which could no longer be settled as well as parties seeking to reopen long-closed cases based on more recent precedent.

Br. of United States at 12.

Finally, Coltec claims that the Fund will suffer no undue prejudice if Rule 60(b) relief is granted. To the contrary, the Fund would in fact lose the benefit of the bargain it made with Coltec. Like Coltec, the Fund took a deliberate risk -- which in fact materialized when it lost *NMA* -- in exchange for a particular benefit, the security of the contemplated escrow. If Coltec were to prevail, the Fund would be prejudiced by losing the benefit it earned. For these reasons, the District Court did not abuse its discretion by failing to grant Coltec's Rule 60(b) motion.[16]

3. *Other Post-Eastern Rulings on Rule 60(b) Motions by Coal Companies*

Our conclusion that the District Court properly denied Coltec's Rule 60(b) motion is in line with the decisions of the other courts that denied relief sought by companies which settled or paid premiums pursuant to final judgments before *Eastern*. In *Blue Diamond Coal*, a coal company that had paid the Coal Act premiums it owed after unsuccessfully litigating its constitutional claims all the way to the Supreme Court, *Blue Diamond Coal Co. v. Chater*, 519 U.S. 1055, 117 S. Ct. 682 (1997) (denying writ of certiorari), moved for Rule 60(b)(6) relief. The district court granted relief, *Blue Diamond Coal Co. v. Shalala (In re Blue Diamond Coal Co.)*, No. 3:93- CV-473, 1998 U.S. Dist. LEXIS 22711 (E.D. Tenn. Nov. 4, 1998), but the Court of Appeals for the Sixth Circuit reversed, stating that a change in decisional law, even when based on constitutional principles, is generally insufficient to justify Rule 60(b)(6) relief. *Blue*

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[16] Additionally, the District Court's denial of Coltec's motion for reconsideration based on the SSA letter was not an abuse of discretion. The letter was not "new evidence" in that Coltec received it while the Rule 60(b) motion was under consideration by the court. Moreover, the District Court did not abuse its discretion because the letter is an extension of the Eastern decision; to the extent Eastern does not justify Rule 60(b) relief, neither does the SSA letter.

Diamond Coal Co., 249 F.3d at 524. It rejected the district court's analogy to a line of cases which establishes that post-judgment relief may be granted when litigants involved in the same transaction or injury get divergent judgments due to a change in decisional law, *see id.* at 525, because those cases involve "transactions with a much tighter nexus ... than a law passed by Congress to regulate the payment of medical health benefits to the retirees of an entire industry." *Id.* at 526. It also found that the equities favored denial of relief, citing the general interest in finality. The Court of Appeals noted that the judgment had been fully executed before Eastern was decided. *See also Templeton Coal Co. v. Apfel*, No. 93-158 (S.D. Ind. Nov. 17, 1999) (denying Rule 60(b)(6) relief to coal company that had lost its constitutional challenge in district and circuit court and filed a petition for certiorari which was denied by the Supreme Court); *Davon, Inc. v. Apfel*, No. 93-198 (S.D. Ind. Nov. 17, 1999) (same).

The case with the facts most similar to this one is *Holland v. Virginia Lee Co.*, 188 F.R.D. 241 (W.D. Va. 1999). Virginia Lee had paid the Fund a set amount in settlement of all past and future premium liability before there was any binding law in the Fourth Circuit as to the constitutionality of the Coal Act. The district court in Virginia Lee denied the company's Rule 60(b)(6) motion, finding that it had no grounds for relief from its voluntary settlement and could not otherwise show extraordinary circumstances. The court emphasized the extraordinary nature of subsection (6) relief, noting that a change in law does not, alone, justify such relief, even when the change is based on constitutional principles, and it rejected various fairness arguments similar to those made by Coltec here. *Id.* at 254-55. The court also rejected the companies' argument that their SSA letters justified relief, finding that these letters were not meant to affect final judgments and that, in any case, the SSA does not have the authority to do so. *Id.* at 256; *see also Lindsey Coal Mining Co. Liquidating Trust v. Apfel*, No. 94-143 (W.D. Pa. Aug. 4, 1999) (denying relief to a coal company that lost its constitutional

challenge in district and appeals court and did not petition for certiorari, based in part on the District Court's denial here).

C. *The District Court's Award of Seven Million Dollars to the Fund*

Coltec argues that the District Court had no "jurisdiction" to award monetary damages to the Fund because the Fund did not request any monetary damages and did not prevail on its one declaratory judgment counterclaim.[17] In response, the Fund points out that it asked for such relief as was just, and argues that the judgment is authorized by Federal Rule of Civil Procedure 54(c) which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c); *see also Kirby v. HUD*, 745 F.2d 204, 207 (3d Cir. 1984) ("As long as the plaintiffs have stated a claim for relief, it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not.").

In awarding the Fund some seven million dollars, the District Court enforced the "so ordered" Stipulation and the Agreement, and the court certainly had the authority to do so. *See Halderman v. Pennhurst State Sch. & Hosp.*, 901 F.2d 311, 317 (3d Cir. 1990) (holding that courts have jurisdiction to enforce settlement agreements incorporated into orders); *Washington Hosp. v. White*, 889 F.2d 1294, 1299 n.9 (3d Cir. 1989) (holding that the fact that court had "so ordered" stipulation gave document "the same effect as a consent order or consent decree" and gave the court jurisdiction to enforce it). As the

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[17] Coltec also asserts it would be illegal for it to pay the Fund without Coal Act liability, under the Labor Management Relations Act § 302, *29 U.S.C. § 186* (barring employer gifts to labor organizations). However, § 302(c)(2) exempts "payment ... of any money ... in satisfaction of a judgment of any court ... or in compromise, adjustment, settlement, or release of any claim." *29 U.S.C. § 186*(c)(2).

Fund argues, its entitlement to pre-Eastern premiums arises from the Agreement, not the Coal Act. This renders irrelevant Coltec's lengthy discussion of the court's lack of authority under the Coal Act to impose liability on it. The real issue is whether the Stipulation, in conjunction with the Agreement, which was "so ordered," authorizes the judgment imposed by the court.

Coltec contends that the Stipulation does not provide a basis for the award. It asserts that the document is unambiguous and very limited, arguing that no language in the Stipulation can be construed as an admission of liability, an acknowledgment that any of its retiree assignments or premium assessments are valid, or an agreement to make premium payments. It claims that the District Court erroneously augmented the plain meaning of the Stipulation by resorting to the "context" of the document when there had been no showing of any ambiguity. We reject this contention. As we previously noted, the language of the Agreement and Stipulation supports the District Court's interpretation of the parties' deal. Simply put, the Fund is entitled to the money pursuant to the parties' bargain.

The District Court's finding that the Fund was, in these circumstances, entitled to the disbursement it requested is unexceptional. Coltec argues, however, that the Agreement and the Stipulation reference "Coal Act premiums" and that, in light of the SSA letter, it did not have any statutory premium liability at the time of the judgment. This argument is easily disposed of because the premiums referred to in the Stipulation and the Agreement clearly refer to the premiums due before *Eastern* was decided. App. at 232.

IV.

CONCLUSION

In sum, Coltec made a binding agreement with the Fund when it signed the Agreement, the Escrow Agreement,

and the Stipulation. The District Court found no basis in the Supreme Court's ruling in *Eastern* to allow Coltec to back out of its agreements, nor do we. Because Coltec failed to open and maintain the escrow account as represented to the court and to the Fund, Coltec does not deserve relief from the agreements it freely entered.

For the reasons described herein, the order and the judgment of the District Court are affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLTEC INDUSTRIES, INC., et al., Plaintiffs,		
v.		Civil Action No. 93-1955
WILLIAM HOBGOOD, et al., Defendants.		

MEMORANDUM OPINION AND ORDER

dated: December 4, 2000

D. BROOKS SMITH. District Judge

Today I confront a host of motions that seek to bring this litigation to a close. I need not recite the complex, and somewhat murky, procedural history of this case. Instead, I will assume a familiarity with my previous rulings and refer readers to my recent opinion of July 20, 2000 for a detailed discussion of the relevant litigation history. Dkt. no. 69. In that July 2Oth opinion, I ordered plaintiffs to pay defendants over $7 million in escrowed funds within thirty (30) days. Id. at 7.[1] Soon after this July 2oth order, plaintiffs filed a notice of appeal, dkt. no. 70, and a motion for stay pending appeal. Dkt. no. 72. In a conference call I conducted with counsel concerning this motion for stay, defendants advised the Court that there were numerous pending claims in this case. Accordingly, defendants argued that the July 20th order was not a "final" order subject to appeal. In particular, the

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[1] Although plaintiffs signed an Escrow Agreement with defendants in December of 1993,plaintiffs failed to set up an escrow account. Dkt. no. 69, at 5-6. Nevertheless, I ordered plaintiffs to make payment whether the money had been escrowed or not.

defendants noted that they had two (2) counterclaims, and that plaintiffs had one claim, still pending. To bring some finality to this lengthy litigation, I issued an order requiring the parties to either proceed with, or to dismiss, their pending claims. Dkt. no. 73. On September 25, 2000, the parties submitted the motions that are before me today.

First, defendants filed a motion to voluntarily dismiss their two (2) counterclaims and to dismiss plaintiffs' remaining claim. Dkt. no. 77. Second, plaintiff Coltec filed a motion for summary judgment, requesting the court to dismiss defendants' counterclaims and to grant judgment in its favor on its remaining claim. Dkt. no. 74. In addition, Coltec requested that I vacate my July 20, 2000 order requiring the disbursement of escrowed funds. Id.[2]

For the following reasons, I will grant defendants' motion to dismiss their counterclaims and deny their motion to dismiss plaintiffs remaining claim. I will grant Coltec's motion to dismiss defendants' counterclaims and for summary judgment. Finally, I will grant Coltec's motion for stay pending appeal of this case and order it to post a bond for just over $7 million.

I

I begin with defendants' counterclaims. This case began when plaintiffs filed a multicount complaint challenging the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 et seq. ("Coal Act"). In response to this complaint, defendants filed a two-count counterclaim. In the first count, defendants sought a declaratory judgment that the Coal Act was constitutional as

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[2] The motion for summary judgment was filed by plaintiff Coltec alone. The parties have indicated that claims brought by the remaining plaintiffs, Four Leaf Coal Company, Inc., and L.G. Wasson Coal Mining Corp., have been settled, dkt. no. 74, although nothing has been filed of record to reflect such a settlement.

applied to plaintiffs. Dkt. no. 11. In the second count, they sought payment of certain past due health care premiums from plaintiffs Four Leaf Coal Company, Inc. and L.G. Wasson Coal Mining Corp.

Defendants have moved for the voluntary dismissal of their counterclaims under Rule 41 of the Federal Rules of Civil Procedure. A motion for voluntary dismissal pursuant to Rule 41(a)(2) is addressed to the discretion of the trial court. Ockert v. Union Barge Line Corp., 190 F.2d 303 (3d Cir. 1951). While Rule 41(a)(2) states that "a dismissal under this paragraph is without prejudice," Fed.R.Civ.P. 41(a)(2), the Rule expressly recognizes that a court can dismiss a claim or counterclaim with prejudice merely by specif[ying] in the order." Id. This is just such a case where defendant's counterclaims should be dismissed with prejudice. As defendants themselves admit, both counterclaims are "moot." Dkt. no. 77, ¶ 3. The first counterclaim, concerning the constitutionality of the Coal Act, has been resolved already by the Supreme Court in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). There is no dispute between the parties about the applicability of that decision to this counterclaim. The second counterclaim is equally without controversy. On its face, the claim only applies to plaintiffs Four Leaf and G.S. Wasson. The defendants have admitted that they seek no payment from these entities. Dkt. no. 77, ¶ 3. Accordingly, this claim is moot as well. Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698 (3d Cir. 1996) ("a case becomes moot when the issues are no longer live or the parties lack a cognizable interest in the outcome.... Article III's 'case or controversy' requirement prevents federal courts from deciding cases that are moot.") (citations omitted).

In light of the foregoing, I will dismiss defendants' counterclaims with prejudice.

II

What remains is Count VI of plaintiffs' Second Amended Complaint. In August 1997, plaintiffs voluntarily

dismissed Counts I through V of their Complaint and First Amended Complaint in this action. Dkt. no. 37. This voluntary dismissal was part of a larger deal entered into between the plaintiffs and the defendants in which the plaintiffs agreed to forgo their constitutional claims and to pursue only a limited challenge to the amount they owed defendants under the Coal Act. As part of this agreement, plaintiffs were permitted to add a claim to their action pending in this Court. This added claim is Count VI. In this count, plaintiffs sought a declaratory judgment that the method of calculating the premiums they owed under the Coal Act was improper. Dkt. no. 39, at 5-6. In addition, they sought an order "releasing from escrow such sums in excess of the recalculated premiums. . ." Id. at 6.

Defendants argue that Count VI should be dismissed because plaintiffs have failed to prosecute this claim. Dkt. no. 77, ¶ 4. In contrast, Coltec argues that it is entitled to summary judgment on its Count VI, alleging that it owes nothing under the Coal Act. I disagree with both parties.

In 1997, the parties entered a Stipulation governing precisely how Count VI would be resolved by this Court. Dkt. no. 35. In this Stipulation, the parties agreed to put Count VI on hold pending the resolution of the case of National Mining Association v. Chater, No. CV-96-N- 1385-5 (N.D. Ala.) ("NMA litigation"). Dkt. no. 38. In relevant part, the Stipulation stated as follows:

> When judgment in the NMA litigation has become final, after the exhaustion of all rights of appellate review (whether by appeal or petition for certiorari) or after the expiration of the time within which such rights may be exercised, then:
>
> > (a) If the holding in the NMA litigation is favorable to plaintiffs in that case, then defendants here will afford

> plaintiffs in this case the same treatment of their new claim for relief in this action as is mandated by the judgment in the NMA litigation; and
> (b) If the holding in the NMA litigation is favorable to defendants in that case, the stay imposed on the new claim for relief set forth in the Second Amended Complaint will be lifted, and plaintiffs will be free to pursue that claim in this Court, and defendants will be free to defend themselves against that claim.

Dkt. no. 38, ¶(a)-(b). As the clear language of the Stipulation shows, the parties provided two ways for Count VI to be resolved by this Court. First, if the NMA litigation was favorable to plaintiffs, then Count VI would be resolved the same way that the NMA litigation was resolved. Second, if the NMA litigation was not favorable to plaintiffs, then and only then, plaintiffs could lift the stay imposed on Count VI and pursue that claim freely in this Court.

Only the first option is open to the plaintiffs at this time. The NMA litigation ended in a way favorable to the plaintiffs-a fact that plaintiffs do not dispute. Indeed, throughout this litigation, defendants have alleged that the NMA litigation was resolved in a way favorable to plaintiffs. See, e.g., dkt. no. 63, Ex. D; Dkt. no. 67,¶ 6. Despite drafting various letters and numerous legal briefs concerning the matters at issue in this case, plaintiffs have never contested this crucial fact. See, e.g., dkt no. 63, Exs. C & G; dkt. no. 65; dkt. no. 75. Indeed, in their most recent filing with this Court, plaintiffs actually admitted the favorable result of the NMA litigation. "It is undisputed," plaintiffs stated, "that, under the result of the NMA litigation, Coltec is entitled to an offset of $152,717.92 against any amount awarded to Defendants." Dkt. no. 75, at 11. Bound by this undisputed fact, plaintiffs are also bound by the clear terms of the Stipulation. Because the result

in the NMA litigation was favorable to them, plaintiffs simply cannot lift the stay imposed on Count VI and "pursue that claim in this Court." Dkt. no. 38, ¶ 6(b).3.[3]

The Stipulation does more than just foreclose plaintiffs from litigating Count VI in this Court. It also dictates exactly how Count VI should be resolved by the parties. In simple terms, the Stipulation requires both parties to adhere to a specific result if the result in the NMA litigation is "favorable" to the plaintiffs. Id. ¶ 6(a). In just such a case, defendants must give the plaintiffs the same deal that plaintiffs received in the NMA litigation. Id. It is undisputed what that "deal" is: plaintiffs are to pay defendants all funds that they set aside to meet their Coal Act obligations minus whatever discount they received under the NMA litigation. Dkt. no. 75, at 11. In this case, these numbers are known: plaintiffs escrowed account should equal $7,281,808.89, and the reduction should be $152,717.92. Dkt. no. 67,¶¶ 6-7.[4] Accordingly, I will enter judgment on Count VI in plaintiffs' favor, providing them with the $152,717.92 offset from the $7,281,808.89 that they owe defendants under the terms of the Escrow Agreement and Stipulation.

Coltec wants a much larger offset: over $7 million to be exact. It insists that it agreed to very little back in the summer of 1997. In particular, Coltec argues that it never agreed to liability under the Coal Act, that it never agreed to make any payments under the Act, and that it never agreed to make payments according to the formula determined by the NMA

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[3] Coltec raises a number of substantive arguments concerning its claim under Count VI of the Second Amended Complaint. Dkt. no. 75. Because the clear language of the Stipulation forecloses Coltec from litigating this matter in this Court, I will not delve into the details of these claims. Nevertheless, many of the arguments raised by Coltec have been addressed by this Court in the past. See, e.g., dkt. no. 69.

[4] In my previous opinion, I incorrectly stated the offset as 152,717.72 Dkt. no. 69, at 7. According to a declaration submitted by defendants, the correct figure is $152,717.92. Dkt. no. 67, ¶ 6.

litigation. I disagree. Coltec's reading of the Stipulation would strip it from its context, ignore its history, and divest it of all meaning. At the time plaintiffs entered their agreement with defendants, plaintiffs were subject to a universe of legal obligations. For one, they were statutorily obligated to make payments to defendants whether they challenged the legality of those payments or not. 26 U.S.C. § 9706(f)(5); see also dkt. no. 63, Ex. A. Second, they were faced with a series of Circuit Court cases, including a decision of the Third Circuit, holding that the Coal Act was constitutional. See, e.g., Lindsey Coal Mining Co. v. Chater, 90 F.3d 688, 693-95 (3d Cir. 1996); see also Holland v. Cardiff Coal Co., 991 F.Supp. 508, 516 (S.D.W.Va. 1997) (noting that more than thirty federal judges had upheld the Coal Act against constitutional challenges and at least six federal courts of appeals had rejected challenges to the Coal Act as a violation of the Takings Clause). Confronted with certain defeat on their constitutional claims, plaintiffs struck a deal with the defendants. They agreed to forgo their constitutional claims and limit their challenge strictly to tinkering with the amount due under the Act. In essence, plaintiffs froze in time their liability under the Coal Act. They agreed to pay defendants, leaving open the question of how much.

I have already discussed the consequences of this deal and have issued a ruling explaining exactly how much plaintiffs owe defendants as a result of this 1997 Stipulation. Dkt. no. 69. The Stipulation forced plaintiffs to take the favorable result of the NMA litigation, no questions asked. And, at a minimum, it prevents them from now claiming that they do not owe the money they agreed to pay. Cf. Holland v. Virginia Lee Co., Inc., 188 F.R.D. 241, 254 (W.D.Va. 1999) (noting that when an agreement to pay money is made "in the belief that it was due, such belief being induced by the existing judicial decisions, the payor has been held not entitled to restitution when those decisions are disapproved in a later decision."). Plaintiffs no doubt wish they had struck a different deal. They did not. They were faced with tough

choices and sought to make the best of what appeared to be a hopeless cause. Based on the record before me, I have little doubt about what the Stipulation between the parties says and what it means. It controls the disposition of plaintiffs' Count VI

III

Finally, plaintiffs have filed a motion for stay pending appeal. I will grant this motion order plaintiffs to post a bond in the amount of $7,129,090.97.

An appropriate Order follows.

ORDER

AND NOW this 4th day of December, 2000, it is hereby ORDERED and DIRECTED that:

1) Plaintiff Coltec's motion for summary judgment, dkt. no. 74, is GRANTED;

2) Defendants' motion to dismiss, dkt. no. 77, is GRANTED to the extent that defendants' counterclaims are dismissed with prejudice and DENIED to the extent that judgment on Count VI is hereby entered in favor of plaintiffs;

3) Plaintiff is entitled to an offset of $152,717.92 from the $7,281,808.89 it currently owes defendants;

4) The Court's July 20, 2000 Order, dkt. no. 69, is hereby amended as follows: Plaintiffs are ORDERED to pay defendants $7,129,090.97 plus interest;

5) In accordance with Rule 58 of the Federal Rules of Civil Procedure, Final Judgment is entered in this case;

6) Plaintiff Coltec's motion for stay pending appeal, dkt. no. 71, is GRANTED;

7) Execution and levy on this Final Judgment, awarding plaintiffs the sum of $7,129,090.97 plus interest will be stayed under Rule 62(d) of the Federal Rules of Civil Procedure during appeal before the Third Circuit Court of Appeals upon filing by plaintiffs herein by December 22, 2000 of good and sufficient supersedeas bond in the amount of $7,129,090.97. Such bond shall be conditioned that plaintiffs shall well and truly satisfy,' the Final Judgment including interest in the event that the appeal before the Third Circuit Court of Appeals shall be dismissed or the Final Judgment affirmed.

BY THE COURT:
/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLTEC INDUSTRIES, INC., et al., Plaintiffs,		
v.		Civil Action No. 93-1955
WILLIAM HOBGOOD, et al., Defendants.		

MEMORANDUM OPINION AND ORDER

dated: July 20, 2000

D. BROOKS, District Judge.

Although this case is procedurally complex, the issue that I confront today is relatively straightforward. In 1997, the plaintiffs and defendants struck a deal, and today, the defendants seek an Order from this court to enforce that deal. In particular, defendants have filed a motion to direct plaintiffs to disburse escrowed funds along with accumulated interest, dkt. no. 62, in accordance with an agreement entered between these parties back in 1997. Defendants contend that plaintiffs owe them $5,481,647.03 in principal, and $1,800,161.86 in interest through June 30, 2000, for a combined total of $7,281,808.89. Dkt. nos. 67 & 68. I will grant defendants motion and order plaintiffs to disburse the amount of $7,281,808.89, plus interest accumulated up to the date of this decision, to the defendants within thirty (30) days.

I

The instant motion represents the end of a long and complex procedural road. In 1993, plaintiffs sought injunctive relief enjoining defendants from assessing them any further

contributions under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 et seq. ("Coal Act"). Plaintiffs alleged that the Act was unconstitutional as applied in that it effected a taking without just compensation and violated both substantive and procedural due process. During the pendency of the litigation, however, the lower federal courts, including the Third Circuit, see Lindsey Coal Min. Co. V. Chater, 90 F.3d 688, 693-95 (3d Cir. 1996), generally held that the Coal Act was constitutional. At approximately the same time, a trade association and several of its member coal mining companies initiated non-constitutional litigation in federal court in Alabama, seeking refunds or credits to rectify alleged overpayments that resulted from the alleged miscalculation of Combined Fund premiums. National Mining Association v. Chater, No. CV-96-N-1385 (N.D. Ala..) (The "NMA" litigation").

Against this backdrop, plaintiffs made a tactical decision. They chose to forgo their constitutional claims and, at the same time, preserve their statutory claims regarding the calculation of the contributions under the Coal Act. Toward that end, plaintiffs and defendants struck a deal. Plaintiffs agreed to dismiss their constitutional claims with prejudice in exchange for the following: if the NMA litigation was resolved in a manner favorable to plaintiffs, then they would be entitled to its benefit; if, however, the NMA litigation was resolved in a way unfavorable to plaintiffs, then they could litigate their statutory claim in this court. Dkt. nos. 35, 37 & 39. The parties filed a joint motion requesting this court to stay this litigation pending the outcome of the NMA litigation. I granted this motion, and this case was stayed. Dtk. no. 39.

What happened next muddied the procedural waters in this case. Shortly after the parties' agreement and voluntary dismissal, the Supreme Court granted certiorari in a Coal Act case, and subsequently held that, as applied to a party arguably similarly situated to plaintiffs, the Coal Act was unconstitutional. See Eastern Enterprises. V. Apfel, 524 U.S. 498 (1998). In accordance with the Eastern Enterprises

decision, the Social Security Administration ("SSA") advised plaintiffs that the assignment of Combined Fund beneficiaries previously made to plaintiffs were void. In other words, plaintiffs were no longer liable for Combined Fund premiums from the plan years after the Eastern Enterprises decision.

A month later, plaintiffs moved this court for relief pursuant to Rules 60(b)(5) and (6) of the Federal Rules of Civil Procedure to revive their constitutional claims -- claims that they had previously dismissed with prejudice. In January 1999, I denied plaintiffs' motion. Dkt. no. 49. In that opinion, I emphasized that plaintiffs had dismissed their claims with prejudice and that a change in decisional law after entry of final judgment is not a sufficient basis for granting relief under Rule 60(b). Id. Shortly after my January 1999 opinion, plaintiffs filed a motion for limited reconsideration. I also rejected this motion. Dkt. no. 56. In that Opinion, I noted that to the extent that the Eastern Enterprises decision applied retrospectively, "plaintiffs have already traded away for consideration the right to litigate the constitutionality of their Coal Act assessments." Id.

In October 1999, the defendants advised plaintiffs that the NMA litigation had been settled in a manner favorable to the plaintiffs. Under that settlement, the plaintiffs in the NMA litigation were entitled to a refund or credit for the difference between the Combined Fund premiums actually assessed and the lower level of premiums that plaintiffs argued should have been assessed. Because the resolution of the NMA litigation was favorable to the plaintiffs, the plaintiffs in this case were entitled to the same treatment under the 1997 agreement. The defendants also informed the plaintiffs that, in exchange for the release required under the terms of the NMA litigation, plaintiffs would receive an offset of $152,717.72 against the amounts due to defendants. Consequently, defendants wanted plaintiffs to disburse the funds held in an escrow account that plaintiffs agreed to set up in December 1993 minus the $152,717.72 offset.

Rather than disburse the funds held in escrow, however, plaintiffs sought authorization for an interlocutory appeal of this court's January 29, 1999 Order. In an Order dated March 1, 2000, I denied plaintiffs motion. Dkt. no. 61. In doing so, I stated the following:

> Plaintiffs cannot "have their cake and eat it too." They must either accept their bargain and work out the issue of how much they owe post-NMA (after which they can take an appeal from my 1999 Rule 60(b) decision), or they can dismiss their calculation claims with prejudice and take final judgment, from which they can appeal. They cannot appeal now, hope for a favorable result, and keep their calculation claim in reserve in case they are disappointed in the Third Circuit.

Dkt. no. 61, n. 1.

In March of 2000, defendants once again requested that plaintiffs disburse the funds held in the escrow account, along with interest due. Plaintiffs refused, maintaining that "[n]o basis for any payment under the Coal Act or viable labor contract has been legally established to exist."
In response to plaintiffs' refusal, defendants filed the instant motion.

II

I have a little trouble granting defendants' motion. In 1997, the plaintiffs in this case struck a bargain. Anticipating that the Coal Act would survive constitutional scrutiny, plaintiffs agreed to dismiss their constitutional claims in favor of having the right to piggyback on the NMA litigation in Alabama. At the time, the plaintiffs knew the risks and the potential benefits of this approach. Now that the deal has resulted in a benefit for the defendants, plaintiffs want, in

essence, to renegotiate their contract. I cannot permit that to happen. Plaintiffs must stand by their bargain. Because the NMA litigation has ended, this litigation is over as well. Plaintiffs must disburse the funds that they agreed to place in escrow back in 1993, plus interest accumulated to date. If plaintiffs wish to take advantage of the offset available to them as a result of the NMA litigation, they are entitled to it.

Nevertheless, plaintiffs raise three arguments in opposition to the defendants' current motion. First, they claim that they are not required to disburse any funds under the terms of their escrow agreement with defendants because the trigger for disbursal of escrowed funds is this court's denial of plaintiffs motion for preliminary injunction, an act, they argue, that has never occurred. Dkt. no. 65, at 5. I reject this argument. On May 9, 1996, I dismissed, and thus effectively denied, plaintiffs motion for preliminary injunction. Dkt. no. 31. In addition, on August 19, 1997, I endorsed plaintiffs' dismissal with prejudice of their constitutional claims. Dkt. no. 37. Consequently, even if the escrow agreement between the parties was meant to be construed as narrowly as plaintiffs propose (which I doubt), the terms of the agreement have been satisfied in this case.

Plaintiffs' second argument is equally without merit. They claim that they cannot be required to disburse funds out of the escrow account because no such account exists. It turns out that plaintiffs never set up the escrow account required by the parties' 1993 agreement. Instead, each month, plaintiffs issued checks to Mellon bank N.A. and had the checks held by plaintiffs' counsel. After receiving a letter from the SSA informing plaintiffs that they were no longer liable for premiums under the Coal Act, plaintiffs' counsel returned the checks in question to Coltec Industries. The upshot, plaintiffs claim, is that no escrow agreement exists from which to pull the funds demanded by defendants. I fail to see how the plaintiffs failure to obey one agreement means that they can therefore disregard a related agreement. As the old adage goes, two wrongs do not make a right. And the fact that the

plaintiffs have a history of failing to satisfy their written agreements does not mean that they can refuse to heed their agreement in this case.[1]

Finally, plaintiffs argue that the defendants have no right to any payment. In essence, plaintiffs seize on the November 1998 letter from the SSA informing them that the original assignment of coal industry retiree was void. Plaintiffs argue that the calculation of an operator's liability for premiums under the Coal Act is a multiple of the number of coal industry retirees assigned to that operator by the Commissioner of Social Security. 26 U.S.C. § 9704. Because the number of coal industry retirees assigned to plaintiffs is zero, plaintiffs' premium liability is also zero. Dkt. no. 65, at 6. Consequently, plaintiffs argue, they owe defendants nothing. Although there is some logic to plaintiffs final argument, I reject it. First, as previously held, even if the Eastern Enterprises decision, and the Commissioners letter issued in accordance with it, apply retrospectively plaintiffs had "already traded away for consideration the right to litigate the constitutionality of their Coal Act assessments," dkt. no. 56, by the time of the Eastern Enterprises decision. Additionally, plaintiffs have bargained away their right to haggle over the precise amount that they owe the defendants. The 1997 agreement between the parties clearly stated that the plaintiffs would accept the result in the NMA litigation if that result was favorable to them. It was -- a fact that plaintiffs do

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[1] I also find the revelation that there is no escrow account to be troubling. At no time between the execution of the December 16, 1993 escrow agreement and plaintiffs' response to the instant motion on June 30, 2000 did the plaintiffs ever inform this court of the defendants that there was no escrow account existence. Indeed, on February 4, 1999, plaintiffs advised the court of the following: "Plaintiff Coltec, in particular, has paid its Coal Act assessments since 1993 into as escrow account pending resolution of the respective rights of the parties, and such monies remain in escrow. This escrow fund contains several million dollars." Dkt. no. 50, ¶ 6. I cannot fathom how such representations could have been made to this court if they were not true.

not dispute. Under the result of the NMA litigation, plaintiffs are entitled to an offset of over $155,000. I recognize that plaintiffs want their offset to be much larger -- $7,281,808.89 to be precise. Nevertheless, I cannot permit plaintiffs to void their agreement simply because they are unhappy with its consequences.

Accordingly, on this 20th day of July, 2000, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1) defendants motion to disburse escrowed funds, dkt. no. 62, is GRANTED;

2) plaintiffs are ordered to pay defendants, within thirty (30) days, $7,281,808.89, which includes $5,481,647.03 in principal, and $1,800,161.86 in interest through June 30, 2000;

3) plaintiffs are also ordered to pay defendants interest at the annual rate of 9% for the period between June 30, 2000 and the date of this Order; and

4) plaintiffs are entitled to an offset of $152,717.72 on the amounts due to defendants if they choose to accept it.

BY THE COURT:
/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 93-1955

COLTEC INDUSTRIES, INC., et al.
v.
WILLIAM HOBGOOD, et al.

January 25, 1999, Decided

MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, District Judge.

In this 1993 case, plaintiffs initially sought injunctive relief enjoining defendants from assessing them any further contributions under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* ("Coal Act"). Plaintiffs alleged that the Act was unconstitutional as applied in that it effected a taking without just compensation and violated both substantive and procedural due process. During the pendency of the litigation, however, the lower federal courts, including the Third Circuit, *see Lindsey Coal Min. Co. v. Chater*, 90 F.3d 688, 693-95 (3d Cir. 1996), generally held that the Coal Act was constitutional.[1] Not all of those cases had become final on

[1] In *Unity Real Estate Co. v. Hudson (Unity I")*, 889 F. Supp. 818 (W.D.Pa. 1995), on a motion for preliminary injunction, I held that Unity had demonstrated a reasonable likelihood of success on the merits of its claim that the Coal Act, as applied to plaintiff, effected an unconstitutional taking, *id.* at 835, although I rejected its claim that the Coal Act violated its substantive due process rights, *id.* at 825. Subsequently, on a more developed factual record and in light of the Third Circuit's decision in Lindsey, I held that the Act did not amount to a taking as applied to Unity.

direct review by the time the above-captioned matter was resolved, and the Supreme Court had yet to speak on the issue.

The resolution that plaintiffs and defendants reached in 1997 was as follows: in exchange for plaintiffs dismissing their constitutional claims with prejudice, defendants would consent to plaintiffs' otherwise out-of-time motion to amend their complaint to state a claim challenging how their contributions under the Act were calculated. Dkt. no. 37. Plaintiffs accordingly dismissed counts one through five with prejudice, *id.*, and the remainder of the case was stayed pending the outcome of litigation (the "*NMA*" case) wending its way though another district court, concerning the calculation of contributions, dkt. no. 38.

Shortly after the parties' agreement and voluntary dismissal, the Supreme Court granted certiorari in *Eastern Enters. v. Apfel*, 522 U.S. 931, 139 L. Ed. 2d 259, 118 S. Ct. 334 (1997), and subsequently held that, as applied to a party arguably similarly situated to plaintiffs, the Coal Act was indeed unconstitutional, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998). This led plaintiffs to file the instant three motions: (1) for relief from their voluntary dismissal with prejudice under Fed. R. Civ. P. 60(b), dkt. no. 41; (2) to lift stay and remove case from administrative hold, dkt. no. 42; and (3) for leave to file third amended complaint, dkt. no. 40. In essence, plaintiffs wish to undo their earlier agreement and to litigate their constitutional claims to judgment, while continuing to pursue their miscalculation claim.

The keystone of plaintiffs' three motions is the one seeking relief under Rule 60(b), because unless that motion is

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Unity Real Estate Co. v. Hudson ("Unity II"), 977 F.Supp. 717, 718 (W.D.Pa. 1997). At about the same time, the First Circuit, in *Eastern Enters. V. Chater*, 110 F.3d 150, 161 n.8 (3d Cir. 1997), rejected my "lone" decision in Unity I as "no persuasively reasoned...." The First Circuit's decision, of course, was reversed by the Supreme Court in *Eastern Enters. V. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S.Ct. 2131 (1998), which provides the basis for plaintiffs filing the instant motions.

granted, there is no legitimate reason to either permit amendment of their complaint or lift the stay. Plaintiffs argue that relief is warranted under Rule 60(b)(5) and 60(b)(6). I will address these two subparts of the rule seriatim.

Rule 60(b)(5) provides an escape from an unfavorable judgment that "has been satisfied, released or discharged, or [if] a prior judgment upon which it is based has been reversed or otherwise vacated, or [if] it is no longer equitable that the judgment should have prospective application." According to plaintiffs, these conditions are met by the supervening decision in *Eastern Enterprises* because that decision overturned the decisional law on which the voluntary dismissal was based, and because *Eastern* makes it inequitable to give the dismissal future effect.

Relief under Rule 60(b) is "an extraordinary remedy and may be granted only upon a showing of exceptional circumstances." *In re Fine Paper Antitrust Litig.*, 840 F.2d 188, 194 (3d Cir. 1988). Failing to litigate to its conclusion a matter that could have been pursued (at least theoretically) to the Supreme Court does not constitute an exceptional circumstance. In *Ackermann v. United States*, 340 U.S. 193, 95 L. Ed. 207, 71 S. Ct. 209 (1950), for example, plaintiff was a naturalized German-American whose naturalization was revoked during the Second World War, along with that of another party. That other party appealed and won, while plaintiff, for reasons of cost, did not file an appeal. In holding that plaintiff was not entitled to relief under Rule 60(b), the Court opined:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home [to pay legal fees and costs]. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight

> seems to indicate to him that his decision not to appeal was probably wrong[.] . . . There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Id. at 198; *accord Fine Paper*, 840 F.2d at 195 (denial of relief a fortiori warranted where judgment "is one for money only, a matter far less than citizenship[]"); *Marshall v. Board of Educ.*, 575 F.2d 417, 424 (3d Cir. 1978).

Moreover, to claim relief under the clause of Rule 60(b)(5) referring to prior reversed judgments, it is not sufficient that the earlier decision have had stare decisis effect; rather, the law of the case itself must change. Put another way, "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment." *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989); accord *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-74 (2d Cir. 1994). As our Court of Appeals has stated:

> For a decision to be "based on" a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision giving rise, for example, to the cause of action or a successful defense. It is not sufficient that the prior judgment provides only precedent for the decision. It should be noted that while [Rule] 60(b)(5) authorizes relief when a judgment upon which it is based has been reversed or otherwise vacated, it does not authorize relief from the judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding.

Marshall, 575 F.2d at 424 n.24 (quoting *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir. 1972)); *accord Harris v. Martin*, 834 F.2d 361, 364 (3d Cir. 1987) (prior judgment clause "does not contemplate relief based merely upon precedential evolution").

The applicability of this basic doctrine is further strengthened--not weakened--by the fact that the judgment from which plaintiffs seek relief was entered by consent pursuant to a partial settlement agreement in which plaintiffs agreed to forever drop their constitutional claims in exchange for the right to litigate their miscalculation theory. When parties make "a free, calculated and deliberate choice to submit to an agreed upon decree[2] rather than seek a more favorable litigated judgment, their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost." *United States Steel Corp. v. Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir. 1979); *accord Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977); *Christian v. All Persons Claiming Right, Title or Interest*, 36 V.I. 285, 962 F. Supp. 676, 680 (D.V.I. 1997). That is especially true here, as the parties' stipulation is measured and precise in its language that plaintiffs shall be entitled to specific rights to either recalculation or further litigation depending on the outcome of the *NMA* case, but absolutely silent on plaintiffs' rights, if any, to continue litigating the constitutionality of the Coal Act. *See* dkt. no. 37, stip. at 3-4. The fact that the parties knew how to provide for just such a contingency as a change in the law by the Supreme Court--but did not--militates heavily against relieving plaintiffs from the effect of a binding agreement supported by consideration.

Nor can plaintiffs avail themselves of the clause permitting relief if "it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5):

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[2] Consent decrees "have many of the attributes of contracts, [and thus] should be construed basically as contracts." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975).

> That clause incorporates the time-honored rule that a "court of equity (may) modify an injunction in adaptation to changed conditions." The definitional limitation in subsection (5) is significant in that it empowers a court to modify a judgment only if it is "prospective," or executory[.] By contrast, a judgment at law for damages for past wrongs is "inherently final," and remains unaffected by a subsequent change in the law.

Marshall, 575 F.2d at 425 (numerous citations omitted). Plaintiffs have, pursuant to the Coal Act, had former miners and their dependents assigned to them for the purposes of paying for benefit costs. Plaintiffs entered into an agreement to dispute only the method of calculating those costs. Essentially, they admitted liability and chose to challenge the measure of damages. This "deal"--which must be enforced--partakes of the nature of money damages, not of an injunction.[3] As such, it falls outside of the "prospective application" clause of Rule 60(b)(5).[4]

Rule 60(b)(6) is equally unavailing to plaintiffs. It, too, requires a showing of extraordinary circumstances. *Moolenaar v. Government of the Virgin Is.*, 822 F.2d 1342, 1346, 1347 (3d Cir. 1987). A change in the decisional law after judgment is entered, however, is not considered exceptional and does not justify relief. *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748 (5th Cir. 1995) (citing *Travelers Indem. Co. v. Sarkisian*, 794 F.2d

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[3] Thus, *Rufo v. Inmates of Suffolk Co. Jail, 502 U.S. 367, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992)*, is inapposite. That case, unlike the situation sub judice, dealt with an ongoing consent decree issued in the context of prison reform litigation. For the same reason, *Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)*, is inapposite as well.

[4] I express no view on whether the same would hold true if, at some future time, additional former miners not contemplated at the time of the parties' stipulation are assigned to plaintiffs.

754, 757 (2d Cir. 1986)); *Dowell v. State Farm Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990) (citing *McKnight v. United States Steel Corp.*, 726 F.2d 333, 336 (7th Cir. 1984)).[5] This is no less true when the decisional law changes because of a finding of unconstitutionality. *See Collins v. City of Wichita*, 254 F.2d 837, 838-39 (10th Cir. 1958).

Plaintiffs, however, rely heavily on *Boughner v. Secretary of HEW*, 572 F.2d 976, 977 (3d Cir. 1978), in which the court stated, in dictum, that "the District Court has no discretion [to deny] motions predicated on ... other extraordinary circumstances such as the unconstitutionality of the statute[] upon which the judgment was based." That case, however, did not turn on the unconstitutionality of a statute, but upon the supine misfeasance of an attorney who inexplicably failed to file responses to motions for summary judgment. *Id.* The court held that this conduct "indicated neglect so gross that it [was] inexcusable[,]" *Id.* at 978, "thus constituting [an] 'extreme and unexpected hardship'[,]" *id.* at 979, sufficient for relief under Rule 60(b)(6). The thrust of the *Boughner* decision is that plaintiffs would not have waived their claims absent the misfeasance of their counsel, in marked contradistinction to the instant case, where plaintiffs explicitly and affirmatively executed a waiver. *Boughner* is therefore inapposite.

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[5] *But see Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (death penalty case where sentence unexecuted, minimal delay in seeking relief, Supreme Court has explicitly granted certiorari to resolve conflict between that case and holding of state supreme court, and considerations of federal-state comity militated in favor of granting relief); *Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982) (per curiam) (noting in dictum that a later decision "may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion," but affirming district court's decision not to re-open prisoner's habeas case in light of supervening Supreme Court decision, because later decision not applicable to his circumstances). None of these cases involved a voluntary dismissal executed in exchange for consideration.

Accordingly, I will deny plaintiffs' motion under Rule 60(b). Because of that, any amendment of plaintiffs' complaint to reinstate the claims they previously dismissed with prejudice would be futile, and I will deny that motion as well. Finally, given these two rulings, there is no reason to lift the stay; that motion, too, will be denied.

An appropriate order follows.

ORDER

AND NOW, this 25th day of January 1999, upon consideration of plaintiffs' motions: (1) for relief from their voluntary dismissal with prejudice under Fed. R. Civ. P. 60(b), dkt. no. 41; (2) to lift stay and remove case from administrative hold, dkt. no. 42; and (3) for leave to file third amended complaint, dkt. no. 40, and the responses thereto, it is hereby ORDERED and DIRECTED that

the aforesaid motions are DENIED.

BY THE COURT,
/s/D. Brooks Smith
D. Brooks Smith
United States District

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLTEC INDUSTRIES, INC. ET AL.,	
Plaintiffs,	
vs.	Civil Action No. 93-1955
WILLIAM P. HOBGOOD, ET AL.,	Judge Smith
Defendants.	

ORDER OF COURT

AND NOW, this 18th day of December, 1997, on consideration of the Joint Motion for Stay and/or to Place Case on Administrative Hold, it is hereby ORDERED and DECREED:

1. That this case is stayed pending the resolution of the pending case of National Mining Association v. Chater, No. CV-96-N-1385-5 (N.D. Alabama), and is placed on administrative hold for such period, and shall be marked CLOSED.
2. When judgment in the NMA litigation has become final, after the exhaustion of all rights of appellate review (whether by appeal or petition for certiorari) or after the expiration of the time within such rights may be exercised, then:
   (a) If the holding in the NMA litigation is favorable to plaintiffs in that case, then defendants here will afford plaintiffs in

this case the same treatment of their new claim for relief in this action as mandated by the judgment in the NMA litigation; and

(b) If the holding in the NMA litigation is favorable to defendants in that case, the stay imposed on the new claim for relief set forth in the Second Amended Complaint will be lifted, and plaintiffs will be free to pursue that claim in this Court, and defendants will be free to defend themselves against that claim.

3. That either Plaintiffs or Defendants may petition this Court for lifting of the stay and removal of the case from administrative ~~hold~~ closure should further proceedings be necessary under the terms of paragraph 2 of this Order.

/s/ D. Brooks Smith
Hon. D. Brooks Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLTEC INDUSTRIES., ET AL.,	)	
Plaintiffs,	)	Civil Action No.
vs.	)	93-1955
WILLIAM P. HOBGOOD, ET AL.,	)	Judge Smith
Defendants.	)	

NOTICE OF VOLUNTARY DISMISSAL OF COUNTS ONE THROUGH FIVE OF THE COMPLAINT AND FIRST AMENDED COMPLAINT

Plaintiffs, Coltec Industries, Inc., Four Leaf Coal Company, Inc. And L. G. Wasson Coal Mining Corporation, pursuant to Rule 41 of the Federal Rules of Civil Procedure and the Stipulated Order of Court of June 30, 1997, hereby give notice of the voluntary dismissal, with prejudice, of Counts One through Four of the Complaint and Count Five of the First Amended Complaint in the above-captioned civil action. This Notice of Voluntary Dismissal does not pertain to Count Six of the Second Amended Complaint.

All parties have consented to this Voluntary Dismissal by Stipulation dated June 30, 1997, signed and endorsed by the Honorable D. Brook Smith, a copy of which is attached hereto.

/s/George E. McGrann
William H. Powderly, III
George E. McGrann
DICKIE, McCAMEY & CHILCOTE
Two PPG Place
Suite 400
Pittsburgh, PA 15222

(412) 281-7272
Counsel for plaintiffs
PA ID # 25604

And NOW, this 19th
day of August, 1997,
IT IS SO ORDERED
/s/ D. Brooks Smith
UNITED STATES DISTRICT JUDGE

cm: All parties of record DC

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLTEC INDUSTRIES, INC., ET AL., Plaintiffs,	)	
vs.	)	Civil Action No. 93-1955
WILLIAM P. HOBGOOD, ET AL., Defendants	)	Judge Smith

STIPULATION

THIS STIPULATION is entered into this 30th day of June, 1997, by and among COLTEC INDUSTRIES, INC., FOUR LEAF COAL COMPANY, INC., and L.G. WASSON COAL MINING CORP. (collectively, "plaintiffs"), WILLIAM P. HOBGOOD, MICHAEL H. HOLLAND, MARTY HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARLTON R. SICKLES, and GAIL R. WILENSKY, as TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT TRUST (collectively, "defendants"), and intervenor the United States of America.

WHEREAS, plaintiffs in this action filed their four-count complaint on November 23, 1993, challenging the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, codified at the U.S.C. §§ 9701 et seq. ("the Coal Act");

WHEREAS, plaintiffs then amended their complaint on December 14, 1993, adding a fifth count relating to the

assignment of certain Combined Fund beneficiaries to plaintiffs;

WHEREAS, the United States has intervened to defend the validity and constitutionality of the Coal Act;

WHEREAS, during the pendency of this case, other litigation has occurred, including National Coal Ass'n v. Chater, No. CV-94-H-780-S, in which the U.S. District Court for the Northern District of Alabama ordered the Commissioner of Social Security to "[r]ecompute the initial premium and all subsequent premiums in accordance with section 9704 (b) (2) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701, et seq. ("the Act") by deducting the total payments the Health Care Financing Administration ("HCFA") made to the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan ("UMWA Plans") for the plan year July 1, 1991 to June 30, 1992, " id. 1995 U.S. Dist. LEXIS 21125 (N.D. Ala. July 20, 1995), aff'd, 81 F.3d 1077 (11th Cir. 1996), (referred to herein as "NCA"); and the pending case of National Mining Ass'n v. Chater, No. CV-96-N-1385-S (N.D. Ala.) (referred to herein as "the NMA litigation"), in which the NMA and several coal operators seek a refund or credit of that portion of premiums paid in excess of the premium levels recalculated in accordance with the order of the District Court in NCA (referred to herein as "the premium differential");

WHEREAS, plaintiffs seek either to obtain the benefits of the NMA litigation, should the outcome be favorable to the plaintiffs in that action, or to retain the right to litigate the issue themselves should the outcome of the NMA litigation be unfavorable to the plaintiffs in that case;

NOW THEREFORE, in consideration of the mutual promises herein set forth, the parties hereby agree as follows:

1. Plaintiffs will file a Second Amended Complaint in which plaintiffs will set forth a new claim for relief that will seek to reduce, by the amount of the premium differential described above, the Coal Act premiums assessed against plaintiffs by defendants; the Second Amended Complaint shall be filed on or before July 31, 1997;

2. Defendants will not object to the filing of the Second Amended Complaint;

3. After the Second Amended Complaint has been filed, served, and docketed, plaintiffs will dismiss with prejudice all other counts against defendants, including counts one through four, set forth in the original Complaint, as well as count five, set forth in the First Amended Complaint; the dismissal shall be accomplished not later than August 11, 1997;

4. Plaintiffs and defendants will then ask the Court to stay the new claim for relief set forth in the Second Amended Complaint, pending resolution of the NMA litigation; this request will be made not later than August 11, 1997;

5. When judgment in the NMA litigation has become final, after the exhaustion of all rights of appellate review (whether by appeal or petition for certiorari) or after the expiration of the time within which such rights may be exercised, then:

a) if the said final judgment in the NMA litigation is favorable to plaintiffs in that case, then defendants here will afford plaintiffs in that case, the defendants here will afford plaintiffs in this case the same treatment of their new claim for relief in this action as is afforded to the plaintiffs in the NMA litigation; and

b) if the said final judgement in the NMA litigation is favorable to defendants in that case, the stay imposed on the new claim for relief set forth in the Second Amended Complaint will be lifted, and plaintiffs will be free to pursue that claim in this Court, and defendants will be free to defend themselves against that claim.

Respectfully submitted,

/s/ George E. McGrann
(by RAF)
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Counsel for Defendants

SO ORDERED.

/s/ D. Brooks Smith
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Stipulation was served upon counsel listed below in accordance with the Federal Rules of Civil Procedure by United States this 30th day of June, 1997 as follows:

Herbert Forrest
Attorney, Civil Division
US Department of Justice
901 E Street, NW
Room 1500
Washington, DC 20530

William H. Powderly, III, Esq.
Jones, Day, Reavis, & Pogue
One Mellon Bank Center
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Pittsburgh, PA 15219

/s/ Ralph A. Finizio
Ralph A. Finizio

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLTEC INDUSTRIES INC., FOUR LEAF COAL COMPANY, INC., and L.G. WASSON COAL MINING CORP., Plaintiffs,	)	
vs.	)	Civil Action No. 93-1955
WILLIAM P. HOBGOOD, MICHAEL H. HOLLAND, MARTY HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARLTON R. SICKLES, GAIL R. WILENSKY, As Trustees of the United Mine Workers of America Combined Fund, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT TRUST, Defendants.	)	

ORDER

And now, this 9th day of May, 1996, this court having been advised by counsel for plaintiffs that they are withdrawing their request for a preliminary injunction, IT IS HEREBY ORDERED that plaintiffs' motion for a preliminary injunction (Docket No. 2) IS DISMISSED.

BY THE COURT,
/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-2458

COLTEC INDUSTRIES, INC., a Pennsylvania Corporation; FOUR LEAF COAL COMPANY, INC., a Tennessee Corporation; L. G. WASSON COAL MINING CORP., an Indiana Corporation, Appellants

v.

WILLIAM P. HOBGOOD; MICHAEL H. HOLLAND; MARTY HUDSON; THOMAS O.S. RAND; ELLIOT A SEGAL; CARLTON R. SICKLES; GAIL R. WILENSKY, as TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED FUND; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT TRUST; UNITED STATES OF AMERICA (Intervenor in D.C.)

No . 00-4385

COLTEC INDUSTRIES, INC., a Pennsylvania Corporation; FOUR LEAF COAL COMPANY, INC., a Tennessee Corporation; L.G. WASSON COAL MINING CORP., an Indiana Corporation

v.

WILLIAM P. HOBGOOD; MICHAEL H. HOLLAND; MARTY HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARLTON R. SICKLES; GAIL R. WILENSKY, as TRUSTEES OF THE UNITED MINE WORKERS OF

AMERICA COMBINED FIND; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; UNITED STATES OF AMERICA (Intervenor in D.C.)

Coltec Industries, Inc.,
Appellant

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, and FUENTES, Circuit Judges

The petition for rehearing filed by Appellant Coltec Industries, Inc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores Sloviter
Circuit Judge

Dated: APR - 3 2002

26 U.S.C. § 9701 (2002)

§ 9701. Definitions of general applicability.

(a) Plans and funds. For purposes of this chapter--

(1) UMWA Benefit Plan.

(A) In general. The term "UMWA Benefit Plan" means a plan--

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan. The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan. The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

(2) 1950 UMWA Pension Plan. The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

(3) 1974 UMWA Pension Plan. The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

(4) 1992 UMWA Benefit Plan. The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

(5) Combined Fund. The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements. For purposes of this section--

(1) Coal wage agreement. The term "coal wage agreement" means--

(A) the National Bituminous Coal Wage Agreement, or

(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

(2) Settlors. The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement. The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operators. For purposes of this section--

(1) Signatory operator. The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons.

(A) In general. A person shall be considered to be a related person to a signatory operator if that person is--

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this

clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination. The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator. The term "1988 agreement operator" means--

(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

(4) Last signatory operator. The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

(5) Assigned operator. The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

(6) Operators of dependent beneficiaries. For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this

chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

(7) Business. For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

(d) Enactment date. For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

26 U.S.C. § 9703 (2002)

§ 9703. Plan benefits.

(a) In general. Each eligible beneficiary of the Combined Fund shall receive--

(1) health benefits described in subsection (b), and

(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

(b) Health benefits.

(1) In general. The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Plan payment rates.

(A) In general. The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which--

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

(B) Reductions. The amount determined under subparagraph (A)(ii) for any plan year shall be reduced--

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

(C) Increases. The amount determined under subparagraph (A)(ii) shall be increased--

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which--

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

(3) Qualified providers. The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

(4) Effective date. Benefits shall be provided under paragraph (1) on and after February 1, 1993.

(c) Death benefits coverage.

(1) In general. The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

(2) Termination of coverage. The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This

paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

(d) Reserves for administration. The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

(e) Limitation on enrollment. The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

(f) Eligible beneficiary. For purposes of this subchapter, the term "eligible beneficiary" means an individual who--

(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

26 U.S.C. § 9704 (2002)

§ 9704. Liability of assigned operators.

(a) Annual premiums. Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums--

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year. Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium. For purposes of this chapter--

(1) In general. The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium. The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of--

(A) the amount determined by dividing--

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical

component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

(3) Adjustments for Medicare reductions. If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

(c) Death benefit premium. The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

(d) Unassigned beneficiaries premium. The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

(e) Premium accounts; adjustments.

(1) Accounts. The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

(2) Allocations.

(A) Administrative expenses. Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than

administrative costs) from such accounts during the preceding plan year.

(B) Interest. Interest shall be allocated to the account established for health benefit premiums.

(3) Shortfalls and surpluses.

(A) In general. Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

(B) Exception. Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to--

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

(C) No authority for increased payments. Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

(f) Applicable percentage. For purposes of this section--

(1) In general. The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments. In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums.

(1) In general. The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

(2) Deductibility. Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(h) Information. The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

(i) Transition rules.

(1) 1988 agreement operators.

(A) 1st year costs. During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

(B) Deficits from merged plans. During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

(C) Failure. If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

(D) Premium reductions.

(i) 1st year payments. In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

(ii) Deficit payments. In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation. Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years. Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

(E) Allocations of contributions and refunds. Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

(2) 1st plan year. In the case of the plan year of the Combined Fund beginning February 1, 1993--

(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

(3) Startup costs. The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

26 U.S.C. § 9706 (2002)

§ 9706. Assignment of eligible beneficiaries.

(a) In general. For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which--

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which--

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase. For purposes of subsection (a)--

(1) Aggregation rules.

(A) Related person. Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded. Employment with--

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

(2) Reassignment upon purchase. If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

(c) Identification of eligible beneficiaries. The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) Cooperation by other agencies and persons.

(1) Cooperation. The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

(2) Providing of information.

(A) In general. Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Commissioner of Social Security in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Commissioner shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Commissioner, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Commissioner shall be so advised.

(B) Limitation. Any information provided under subparagraph (A) shall be limited to information necessary for the Commissioner to carry out his duties under this section.

(3) Trustees. The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

(e) Notice by Commissioner.

(1) Notice to fund. The Commissioner of Social Security shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

(2) Other notice. The Commissioner of Social Security shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been

assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

(f) Reconsideration by Commissioner.

(1) In general. Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review. An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review.

(A) Error. If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error–

(i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

(B) No error. If the Commissioner of Social Security determines under a review conducted under paragraph (2) that no error occurred, the Commissioner shall notify the assigned operator.

(4) Determinations. Any determination by the Commissioner of Social Security under paragraph (2) or (3) shall be final.

(5) Payment pending review. An assigned operator shall pay the premiums under section 9704 pending review by the

Commissioner of Social Security or by a court under this subsection.

(6) Private actions. Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner.

(g) Confidentiality of information. Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

26 U.S.C. § 9707 (2002)

§ 9707. Failure to pay premium.

(a) General rule. There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

(b) Amount of penalty. The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $ 100 per day in the noncompliance period with respect to any such failure.

(c) Noncompliance period. For purposes of this section, the term "noncompliance period" means, with respect to any failure to pay any premium or installment thereof, the period--

(1) beginning on the due date for such premium or installment, and

(2) ending on the date of payment of such premium or installment.

(d) Limitations on amount of penalty.

(1) In general. No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

(2) Corrections. No penalty shall be imposed by subsection (a) on any failure if--

(A) such failure was due to reasonable cause and not to willful neglect, and

(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

(3) Waiver. In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

(e) Liability for penalty. The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

(f) Treatment. For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

26 U.S.C. § 9708 (2002)

§ 9708. Effect on pending claims or obligations.

All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the "evergreen" clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

(seal)

SOCIAL SECURITY

November 9, 1998

Coltec Industries Inc
3 Coliseum Centre
2550 West Tyvola Road
Charlotte, NC 28217

ATTN: Robert Tubbs
General Counsel

Re: Coltec Industries Inc
EIN: 13-1846375

Dear Sir:

Pursuant to the June 25, 1998 Supreme Court decision in Eastern Enterprises v. Apfel, the assignments to Coltec Industries Inc under the provisions of the Coal Industry Retiree Health Benefit Act of 1992 are void. We have notified the United Mine Workers of America Combined Benefit Fund about our decision.

Sincerely,

/s/ Marilyn G. O'Connell
Marilyn G. O'Connell
Associate Commissioner
for Program Benefits

cc:
William Powderly, Esq.
UMWA Combined Benefit Fund